167-548

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 623

BUTLER F. ABBOT, APPELLANT,

vs.

John W. Ross et al., Commissioners of THE DISTRICT OF COLUMBIA.

No. 624

John W. Ross et al., Commissioners of THE DISTRICT OF COLUMBIA, APPELLANTS,

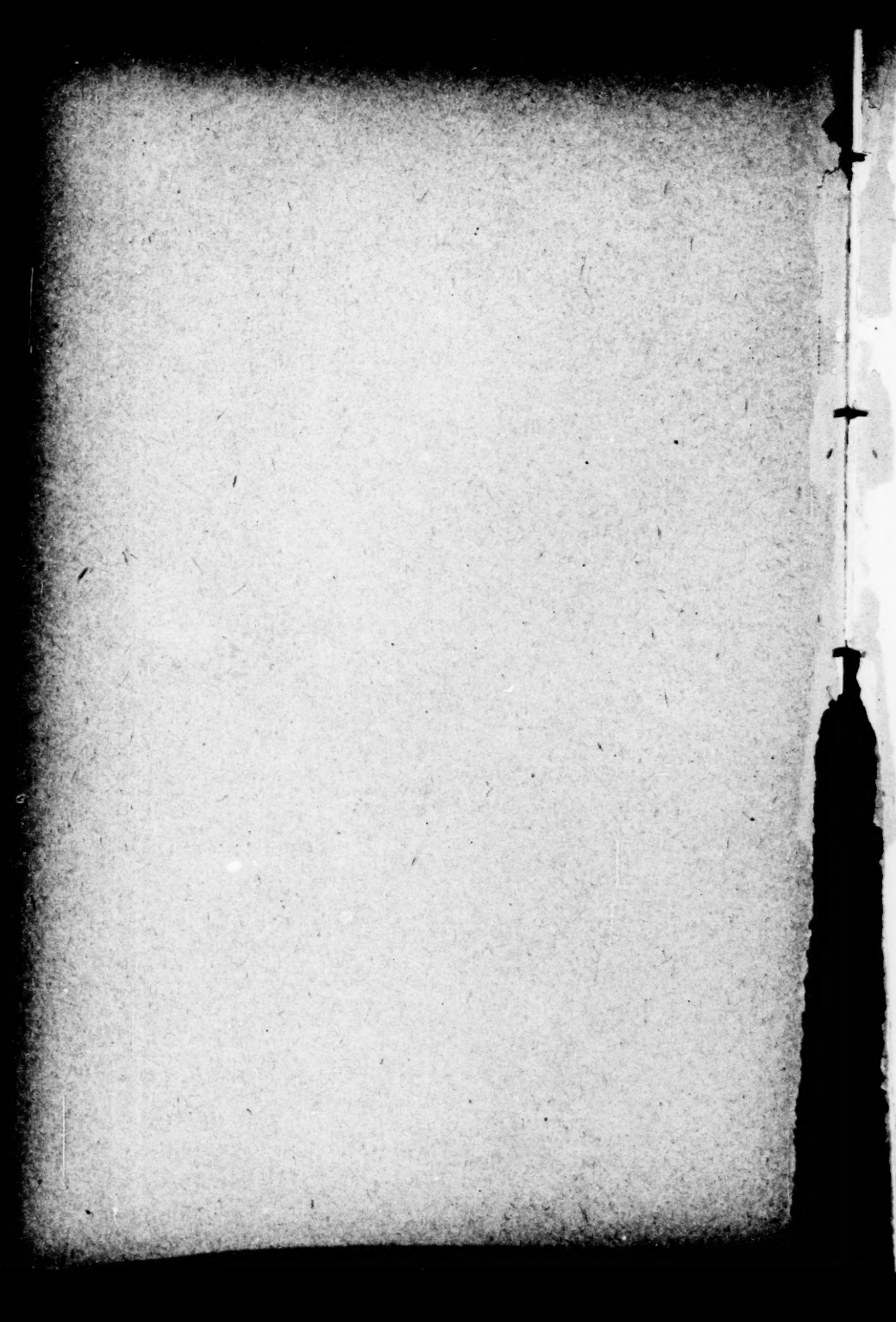
vs.

CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOT, ET AL.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED Oct. 17, 1896.

(16,443)



( )

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. .

BUTLER F. ABBOT, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

No. .

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vs.

CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOT, ET AL.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
CHARLES H. ARMES *et al.*
} No. 552.

a In the Supreme Court of the District of Columbia.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section 1 of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419, District Court.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition. Filed September* 27, 1895.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section 1 of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. 419.

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, respectfully shows to the court as follows:

1. That Congress, by its act approved March 2, 1893, authorized and directed these petitioners, the Commissioners of the District of Columbia, to prepare a plan for the extension of a permanent system of highways over all that portion of the District not included in the limits of the cities of Washington and Georgetown, said system to be made as near in conformity to the street plan of the city of Washington as said Commissioners should deem advisable and practicable; and thereafter Congress, by its act approved March 2,

1895, authorized these petitioners, the Commissioners aforesaid, to make such minor and essential changes in existing subdivisions made in compliance with its act to regulate the subdivision of land within the District, approved August 27, 1888, as the said Commissioners should deem advisable and practicable for the purpose of connecting subdivisions and for a better conformity to the general plan of the city of Washington.

2 2. These petitioners, who are the Commissioners of the District of Columbia, proceeded with the preparation of a plan for the aforesaid extension of a permanent system of highways, such plan being prepared in sections, as contemplated by said act of Congress of March 2, 1893, and they prepared, adopted, and duly certified to the commission provided for in section 2 of said act of March 2, 1893, a copy of the map of section 1 of said plan for the extension of a permanent system of highways.

3. That said map has been returned to these petitioners with the approval of a majority of the commission provided for in said act, and said map approved was on August 31, 1895, filed and recorded in the office of the surveyor of the District of Columbia, as required by said act of Congress, and the same now remains in the office of the said surveyor.

4. That said map so filed and recorded shows accurately the boundaries and dimensions of and number of square feet in the streets, avenues, and roads established by your petitioners, Commissioners aforesaid; the boundaries and dimensions of and number of square feet in each of the then existing highways in the area covered by said map, and the boundaries and dimensions and number of square feet in each lot of suburban subdivisions within the area covered by said map, owned by private persons, and said map also contains such explanations as are necessary to a complete understanding of the same and is in all respects in compliance with the requirements of the said act of Congress.

5. That the suburban subdivision known as Denison and Leighton's subdivision of a part of Mount Pleasant and Pleasant Plains, in the District of Columbia, was an existing subdivision on and prior to August 31, 1895.

6. That the aforesaid map of section 1 of the plan for the permanent system of highways, prepared by your petitioners and

3 filed and recorded as aforesaid, lays out and alters existing highways and makes certain so-called reservations and public spaces in the said subdivision known as Denison and Leighton's subdivision of a part of Mount Pleasant and Pleasant Plains, and dispenses with certain highways and parts of highways in said subdivision as follows:

For laying out 16th street through the subdivision from north to south, the extension of 17th street through the western part, a part of a highway along the eastern boundary, a highway through the south part; for the widening of Columbia road, Kenesaw avenue, and Grant street; for a reservation along Columbia road, and for dispensing with parts of 15th and 16th streets, all of which fully and in detail appears by reference to a copy of so much of the

material portions of said map of section 1 as embraces said subdivision, which is herewith filed and marked "Commissioners' Ex. No. 1," which is prayed to be taken and considered as a part hereof.

Wherefore your petitioners pray that this honorable court will proceed to condemn permanent rights of way for the public over all the land lying within the limits of the subdivision known as Denison and Leighton's subdivision of a part of Mount Pleasant and Pleasant Plains not already owned by the United States or the District of Columbia or already dedicated to public use as a highway, as described on the map, Commissioners' Exhibit No. 1 aforesaid, in the manner provided for in said act of Congress of March 2, 1893.

2. That public notice, as required by said act, be given to all persons having any interest in the proceedings to attend the court at a date to be named in said notice, and to continue in attendance until the court shall have made a final order in the premises.

3. That after such notice the court shall cause a jury to be summoned as provided in the said act.

4. That such other and further orders may be passed as
4 are contemplated by the said act, to the end that the aforesaid permanent rights of way for the public over the said land may be obtained and secured.

5. And for such other and further proceedings and relief in the premises as is contemplated by the said act of Congress of March 2, 1893, and they will ever pray, etc.

JOHN W. ROSS,
GEO. TRUESDELL,
CHAS. F. POWELL,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

Order Giving Public Notice.

Filed October 2, 1895.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for the said District.

In Re Suburban Subdivision known as Dennison and Leighton's Sub. of a Part of Mt. Pleasant and Pleasant Plains, in the District of Columbia, in "Section One" of the Map of Permanent System of Highways. No. 419.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to section 6 of an act of Congress approved March 2, 1893, entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," have filed a petition in this court praying the condemna-

tion of a permanent right of way for the public over all the
5 land lying within the limits of said subdivision not already owned by the United States or the District of Columbia or dedicated to public use as a highway, which is included within the highways or reservations laid out by said Commissioners, on the map known as "section one" of the plans for a permanent system of highways provided for by said act of Congress.

The map prepared by said Commissioners, known as "section one," dispenses with certain highways and parts of highways, and opens up others in said subdivision, viz:

For laying out 16th street through the subdivision from north to south, the extension of 17th street through the western part, a part of a highway along the eastern boundary, a highway through the south part; for the widening of Columbia road, Kenesaw avenue, and Grant street; for a reservation along Columbia road, and for dispensing with parts of 15th and 16th streets.

A copy of so much of said map as shows the proposed changes is on file in the cause for the information of all concerned.

It is ordered, this 2nd day of October, 1895, that all persons interested in the proceedings be, and they are hereby, required to appear in this court on or before the 15th day of November, 1895, and show cause, if any they have, why the prayer of said petition should not be granted and why this court should not proceed as directed by said act of Congress: Provided that a copy of this order be published in the Evening Star and the Washington Post newspapers at least six times and in the Washington Law Reporter once before said 15 day of November, 1895.

By the court:

W. S. COX, *Justice.*

(Here follows map marked p. 6.)

7 *Memorandum.*

The following-named persons have entered their appearance in this cause pursuant to the rule to show cause, either in proper person or by attorney:

Charles H. Armes, Mary B. Armes, Frank L. Averill, F. B. Abbott, American Security and Trust Company, Robert N. Bayles, Susan A. Berry, James A. Bates, Zeno B. Babbitt, Mary A. Cushing, Nancy W. Cushing, Charles M. Campbell, William O. Dennison, M. W. Dunn, Mortimore Du Perow, Katherine M. Edmonds, Matthew W. Edmonds, Benjamin J. Edwards, Katherine S. Foos, Douglas F. Forrest, Emma B. Fitzgerald, Mary T. Fitzhugh, Albert S. Flint, Mark F. Finley, Emerella Faris, Franklin Investment Company, Mrs. Watson Farrar, Alfred T. Gage, Alexander Grant, trustee; John M. Henderson, John B. Henderson, Theodore A. Harding, Thomas W. Hunster, Priscilla E. Henley, Mary F. Henderson, Clarence L. Harding, Anna M. Heinz, Charles Hampson, D. A. Irwin, David Ingalls, Mary R. Langtree, Frederick J. Loudin, James C. Matthews, Donald McPherson, E. French Moran, Jas. B. Mc-

Laughlin, Oliver A. Morris, Charles A. Mason, James H. Meriwether, trustee; Edward Mahon, John W. McMahon, Columbia R. McMahon, Emeline L. Morse, John Mitchell, Jr., trustee; Charles F. Nesbit, trustee; Stanley Pearce, Dorliski E. Parker, John Rudden, Elbert Robertson, John E. Reubsam, Charles W. Rowzee, William Ramsey, George F. Stone, Elizabeth Smith, G. Warfield Simpson, Mary E. Sleman, John B. Sleman, Oscar P. Schmidt, Louis M. Smith, Thomas H. Sypherd, William F. Snyder, Edwin H. Snyder, Jennie F. Skinkle, Alice E. Snyder, Marie Schmidt, Frederick A. Schmidt, James N. Tyner, Christine Tyner, Sadie Tilley, Huldah Tilley, Wm. W. Townsend, Lydia Tanner, The United States of America, Elizabeth Varney, Isabella Varney, Arthur H. Whitlark, H. O. Williams, Martha H. Wheeler, William Waring, trustee.

8 *Answer of Respondents Schmidt.*

Filed Nov. 15, 1895.

In the Supreme Court of the District of Columbia, Sitting as a District Court for the United States.

In Re Suburban Subdivision known as Dennison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, in Section One of the Map of Permanent System of Highways. No. 419.

Now come Marie Schmidt and Fred. A. Schmidt, two of the persons interested in the proceedings in the above-entitled cause, and by Chapin Brown and Arthur H. O'Connor, their attorneys, appear pursuant to the rule of the court issued herein on the 2nd day of October, 1895, and say that they are the owners of certain land involved in these proceedings, the same being lot 131 of C. Wilson's subdivision of lot 127, lot 44 and the east 86.64 feet of lot 47, in said subdivision; and for cause why the prayer of the petition filed herein should not be granted and why the court should not proceed as directed by the act of Congress in said rule mentioned, respectfully show:

1. That said act of Congress in said rule mentioned is in violation of article five (5) of the amendment of the Constitution of the United States and is void, in that the said act makes no provision for the payment of just compensation to the owners for the taking for public use of the private property involved in these proceedings.

2. That the things to be done under the said act of Congress are, and the purpose of the same is, for the benefit of the general public in the District of Columbia, and the provision in said act requiring one-half of the expense and cost thereof to be assessed upon
9 property to be found by the jury in said act provided for, to be benefited thereby, is in violation of article five (5) of the amendments of the Constitution of the United States and is void.

3. That all of the provisions of said act of Congress are vague and uncertain and incapable of enforcement at law, and therefore void.

CHAPIN BROWN,
ARTHUR H. O'CONNOR,
Attorneys for Respondents.

10 *Order to Summon Jury.*

Filed Nov. 29, 1895.

In the Supreme Court of the District of Columbia, in Special Term, Holding a District Court.

In Re Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains. District Court, No. 419.

Upon consideration of the petition of the District of Columbia, filed herein on the 27th day of September, A. D. 1895, and it appearing to the court that due publication has been had of the order of this court passed herein on the second day of October, A. D. 1895, requiring that all persons interested in these proceedings appear in this court on or before November 15, 1895, and it further appearing to the court that each and all of the owners of the land sought to be condemned and affected by these proceedings, except Frederick J. Loudin, owner of lot No. 89, and Martha Wheeler, owner of the north forty feet front of lot No. 114, have caused their appearance to be entered herein, and it further appearing to the court that the said Frederick J. Loudin and Martha Wheeler are non-residents of the District of Columbia, and that it is impracticable to obtain personal service upon them, it is, this twenty-ninth day of November, A. D. 1895, ordered that the United States marshal for the District of Columbia summon a jury of seven judicious, disinterested men not related to any person interested in these proceedings and not in the service or employment of the District of Columbia or of the United States, to be and appear in this court on Monday, the second day of December, 1895, at ten o'clock a. m. of said day, for the purpose of considering the evidence and determining such questions as may be submitted to them by the court during the proceedings in this case.

E. F. BINGHAM, *C. J.*

11 *Marshal's Return.*

Pursuant to the within order, summoned personally the following jurors Nov. 30, 1895:

1. John E. Herrell.
2. Louis D. Wine.
3. John S. Swormstedt.
4. Wm. B. Holtzclaw.
5. Philip M. Snowden.
6. Joseph A. Settle.
7. J. McLean Carusi.

ALBERT A. WILSON,
U. S. Marshal D. C.

12 *Jury Sworn and Respited.*

In the Supreme Court of the District of Columbia, Sitting as a District Court, December 2nd, 1895.

In Re Denison and Leighton's Sub. of Mt. Pleasant. 419, Dist. Ct. Docket.

Comes the marshal of the District of Columbia and reports to the court his selection of the following-named persons to constitute the jury of condemnation herein, and the same, being seen, is approved by the court; and thereupon, on motion of the attorney for the District of Columbia, it is ordered by the court that the jury view the premises under consideration in the presence of the said marshal and district attorney, as well the attorney representing each party interested, but that no argument shall be heard by said jury on the ground.

The names of jurors are as follows:

1. John S. Herrell.
2. Louis D. Wine.
3. John S. Swormstedt.
4. William B. Holtzclaw.
5. Philip M. Snowden.
6. Joseph A. Settle.
7. J. McLean Carusi.

And thereupon the jury, being sworn, is respited until Dec. 4, 1895.

13 *Answer of B. F. Abbot.*

Filed Dec. 2, 1895.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for the said District.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision in the District of Columbia, in Section One of the Map of Permanent System of Highways. No. 419.

Now comes B. F. Abbot, the sole owner of lot sixty-one (61), in Denison and Leighton's subdivision, referred to and described in the petition filed herein as a subdivision in the District of Columbia, in section one of the map of permanent system of highways, by his attorney, Nathaniel Wilson, and, in answer to the rule to show cause in the above-entitled case why this court should not proceed as prayed in said petition and why the prayers of said petition should not be granted, says:

1. The respondent, B. F. Abbot, is the sole owner of said lot numbered sixty-one (61), in said subdivision called Denison and Leighton's subdivision.

2. The act of Congress entitled "An act to provide a permanent

system of highways in that part of the District of Columbia lying outside of cities," approved March 2, 1893 (27 Stats., 532), is void and inoperative because in violation of the Constitution of the United States of America in this:

A. It provides for the taking of private property and specially the property of this respondent for public use, but does not
14 make to the respondent or provide that just compensation shall be made to him for the private property so taken, as is required by article five of the articles in addition to an amendment of the Constitution of the United States.

B. No provision is made by said act or by any provision of law for the payment of any damages that may be assessed or found to those whose property is taken for public use under the provisions of said act.

C. Said act provides that when the use of a part only of any tract or parcel of any land shall be condemned the benefits that the purpose for which the same is to be taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same is taken into consideration and charged against the said piece or parcel of ground so taken and from the value of the remainder thereof.

D. Said act provides that the assessment so made against the pieces and parcels of land under the provisions of said act by the verdict of the jury as therein provided shall be a lien upon the land assessed.

E. Said act provides that pieces or parcels of land not taken for public use under the provisions of said act shall be chargeable with the estimated value of the benefits accruing by reason of the taking of other pieces or parcels of land.

F. Said act is in other respects in violation of the Constitution of the United States of America and is void.

NATH'L WILSON,
Proctor for Respondent, B. F. Abbot, & of Counsel.

15 *Motion to Discharge Jury.*

Filed Dec. 16, 1895.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, *Indicated* within Section One of the Plan for the Extension of a Permanent System of Highways in the District of Columbia.

Now comes B. F. Abbott, the owner of the piece or parcel of ground numbered sixty-one on the plat attached to and made a part of the petition in this case, and by his attorney moves that the jury be discharged and this proceeding dismissed, and assigns the following grounds for this motion:

1. It is shown by said petition and by the evidence taken herein that the plan for the extension of a permanent system of highways in the District of Columbia in respect of section one having been duly approved by the Commissioners of the District of Columbia, a map of said section one was made in pursuance of the requirements of the act of Congress referred to in this proceeding as the act of March second, eighteen hundred and ninety-three, and after being approved in writing by the Commissioners created by said act was returned to the said Commissioners of the District of Columbia and was by them filed in the office of the surveyor of the District of Columbia, and was duly recorded in the office of the said surveyor on the 31st of August, A. D. 1895.

When the said map was recorded as aforesaid it thereupon became and was unlawful under the terms of said act to admit to
16 record in the office of the said surveyor or of the recorder of deeds of the District of Columbia any other or further subdivision of the land included in said map, unless with the approval of the said Commissioners of the District of Columbia and in conformity to said map.

When said map was recorded as aforesaid it thereupon became and was unlawful under the terms of said act for said Commissioners or any other officer or person representing the United States or the District of Columbia to thereafter improve, repair, or assume any responsibility in regard to any abandoned highway within the area covered by said map.

The said map of section one, so recorded as aforesaid, includes the pieces or parcels of ground known and described and appearing on the books and records of the surveyor's office as Denison and Leighton's subdivision, and said pieces or parcels of ground are the pieces or parcels of ground included and described in the plat attached to and made part of the petition in this case.

Of the said lot numbered sixty-one in said plat a larger part, to wit, one-half, is within the lines and the limits of the highway laid down on said map and designated as Sixteenth street.

The filing and recording of the said map in the office of the surveyor of the District of Columbia constituted in contemplation of law and was in fact the taking of a part of said lot for public use; that part of said lot sixty-one shown by said plat to be within the limits of said Sixteenth street extended was by reason of and under the provisions of said act of Congress taken for public use on the said 31st day of August, 1895.

No compensation was then or has since been made therefor.

No just compensation for such taking is provided for by said act or by any act of Congress.

17 2. If the filing and recording of said map as aforesaid shall be held not to constitute the actual taking of said part of said lot for public use, then no time is fixed or provided by said act when the taking shall be considered as completed, and no provision is made by said act of Congress or by any act of Congress for compensation to be made when said taking is actually made or completed.

2½. It is provided by the eighteenth section of said act that in case the court shall enter judgment of condemnation in any case and appropriation is not made by Congress for the payment of such award within the period of six months, Congress being in session for that time after such award, or for the period of six months after the meeting of the next session of Congress, the proceedings shall be void and the land shall revert to the owners, but it is not provided by said act that in the event of failure of Congress to make such appropriation the plan for the said extension of a permanent system of highways adopted, as hereinbefore stated, and the map of said section one so approved as aforesaid and filed and recorded in the office of the surveyor of the District of Columbia on the 31 of August, 1895, as aforesaid shall become inoperative, void, and of no effect; on the contrary, the said plan and the said map so recorded as aforesaid remain and are in full force and effect, and a new proceeding may thereupon be instituted, similar to this proceeding, for the condemnation of the pieces or parcels of land, or the use thereof, described in said map as within the limits of said proposed extensions of said streets and highways, and the repetition of such proceedings, with reference to said map and the pieces and parcels of ground described in the plat attached to the petition filed in this case, may be continued indefinitely, in violation of the rights and to the great and irreparable injury of all owners of the pieces
18 and parcels of ground described in said plat.

3. It is not within the power of Congress to enact or provide that in cases where the use of a part only of a tract or parcel of land to be condemned, as in the case of the said lot sixty-one, the jury, in assessing damages therefor, shall take into consideration "the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and to require the jury to render their verdict accordingly."

4. It is not within the power of Congress to enact or provide that, the amount justly due as damages for each highway or reservation or part thereof condemned and established under said act having been determined in the manner provided by the said act, one-half thereof shall be assessed against each parcel of land which the jury shall find to be so benefited according to its proper proportional part of the whole of said one-half of the damages.

5. The owners of pieces and parcels of ground included within the limits of the streets and avenues described in the plat attached to the petition in this case and proposed to be taken for the extension of the streets and avenues in said plat are entitled to be compensated therefor in money which is a legal tender, not without the consent of the owners thereof be lawfully made therefor, partly in money and partly in the estimated value of benefits that may result from the purpose for which said pieces or parcels of ground are to be taken.

6. Section eleven of said act approved March 2, 1895, provides in substance and effect that when the use of a part only of any

parcel or tract of land shall be condemned, the verdict of the
19 jury in respect of damages shall be for the difference between the value of the land taken and the estimated benefits that will result to the remainder.

The aggregate amount of these verdicts makes up the sum of the damages determined to be due in respect of each highway or reservation or part thereof condemned.

Section fifteen of said act provides that one-half of the amount so ascertained shall be assessed against *each parcel* of land which the jury shall find to be benefited by the laying out and opening of the proposed highways.

The effect of these provisions of the law would be to create a double charge for supposed benefits upon the owners of these lots the use only of a part of which is condemned.

7. The provisions of the law by which it is sought to charge not only parts of the lots actually taken for public use, but all lots, wherever situated in the District of Columbia, with whatever benefits the jury may find can be conferred on them by the laying out and opening of the proposed highways, are integral parts of the act, and if found to be in violation of the Constitution of the United States cannot be eliminated and the remainder of the provisions of the act preserved and carried into effect.

8. No power is by the said act vested in the juries therein provided for to inquire into or determine or to render a verdict for or in respect of the damages caused to the owners of abutting lots by the abandonment of the streets and avenues marked as abandoned on the plat attached to the petition filed in this case.

9. The act under which these proceedings were instituted and are being carried on is in its several provisions so uncertain and contradictory as to be impossible of execution, and is in other
20 respects unconstitutional and void.

NATH'L WILSON,
Att'y for B. F. Abbott, Owner of Lot Sixty-one, in the Plat Attached to the Petition in this Case.
W. L. COLE,
On Behalf of the Owners of the Lots in Respect of Which He Has Entered His Appearance.
CHAPIN BROWN,
A. H. O'CONNOR,
On Behalf of the Owners of the Lots in Respect of Which We Have Entered Our Appearance.

Order Overruling Motion to Dismiss.

MONDAY, *December* 16, 1895.

The court resumes its session pursuant to adjournment, Cox, justice, presiding.

In Re Denison and Leighton's Subdivision Condemnation. No. 419. District Court.

Come again the parties aforesaid in the manner aforesaid and the jury that was respited Friday, and thereupon the evidence in this cause is concluded; whereupon the motion of B. F. Abbott to dismiss the jury and the whole proceeding, which motion is duly filed, *it* is by the court overruled; and thereupon the court instructs the jury according to the law, and they retire to consider of their verdict. The respondents duly note exceptions to the prayers granted and instructions not given as prayed for.

21 SATURDAY, *January* 11, 1896.

The court met pursuant to order, Mr. Justice Cox presiding.

In Re Denison and Leighton Subdivision Condemnation. No. 419.

Now comes here the petitioners and respondents, by their counsel, and the jury that was charged and retired to consider of their verdict on December 16, 1895, and thereupon said jury give to the court their verdict in accordance with the form heretofore agreed upon by the court and counsel; which is accordingly filed and order- a part of the record in this cause.

22 *Verdict. Filed January* 11, 1896.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In Re Suburban Subdivision known as Dennison and Leighton's Subdivision, Included within Section "One" of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419.

The court hereby prescribes and directs to be submitted to the jury the following form of verdict to be rendered by the jury in this case.

WALTER S. COX, *J.*

We, the jury in the above-entitled cause, hereby render the following verdict and award, as set forth in Schedules I, II, and III, hereto annexed and made part hereof.

LOUIS D. WINE. [SEAL.]
JOHN E. HERRELL. [SEAL.]
JOHN S. SWORMSTEDT. [SEAL.]
W. B. HOLT-CLAW. [SEAL.]
PHILIP M. SNOWDEN. [SEAL.]
JOSEPH A. SETTLE. [SEAL.]
J. McLEAN CARUSI. [SEAL.]

23 SCHEDULE I.

Description of the parcel.		Number of square feet in the parcel.	Number of square feet taken.	Number of square feet not taken.	Compensation for land taken.	Compensation for buildings taken.	Damages to remainder of parcel, including damages to the buildings.	Benefits to remainder of the parcel.	Award being for compensation and damages, less benefits.
Lot	44	7,485	4,255.3	3,229.7	$4,893 59			$1,614 85	$3,278 74
East	47	4,483.5	1,063.5	3,420	265 87			265 87	
West	47	6,988.2							
	48	11,003.5	386.5	10,617	154 60			154 60	
	49	11,532	1.7	11,530.3	68			68	
	50	8,538							
	51	17,098	1,018.5	16,079.5	712 95			712 95	
	52	8,307	1,269.7	7,037.3	1,015 76			1,015 76	
N. of	53	11,282.6	3,261.7	8,020.9	3,914 04			2,000	1,914 04
So. of	53	2,435.4							
	148	2,691.9	274.6	2,417.3	274 60			274 60	
	149	2,157.3	371.5	1,785.8	371 50			371 50	
	150	2,288.4	409.8	1,878.6	409 80			409 80	
	151	2,424	448	1,976	448			448	
	152	3,703.2	1,074.5	2,628.7	1,074 50			1,074 50	
	54	6,365	4,122.3	2,242.7	4,122 30			1,121 35	3,000 95
Col. road:									
	122	7,774.2	7,052.7	721.5	7,052 70			180 38	6,872 32
	123	7,643.5	7,643.5		7,643 50	$4,000			11,643 50
	124	2,500	2,500		2,500				2,500
	125	2,500	2,500		2,500				2,500
	126	2,208.5	2,208.5		2,208 50				2,208 50
	127	13,404	13,404		13,404	100			13,504
	55	6,538	3.6	6,534.4	2 88			2 88	
	56	8,364.7	7,962.1	402.6	6,369 68				6,369 68
	57	7,050.2			5,287 65				5,287 65
	58	6,916.8	6,906.6	10.2	4,834 62	3,200			8,034 62
	59	6,783.5	6,321.5	462	4,425 05				4,425 05
	60	6,650.3	5,531.5	1,118.8	3,872 05			279 70	3,592 35
	61	6,517	4,729	1,788	3,073 85			536 40	2,537 45
	62	8,987	4,556.5	4,430.5	3,417 37			1,329 15	2,088 22
	65	8,307	8,307		6,093 60	7,000			13,093 60
	68	6,132.4	2,884.7	3,247.7	2,019 29			811 92	1,207 37
	69	6,132.4	2,082.2	4,050.2	1,457 54			1,215	242 54
	70	6,132.5	1,279.7	4,852.8	895 79			895 79	
	71	6,132.4	477.2	5,655.2	357 90			357 90	
	118	5,427.7	1,830.3	3,597.4	1,372 72			1,259 09	113 63
	119	4,715.3	1,706.3	3,009	1,062 24			1,000	962 24
	120	5,867	1,500	4,367	1,500			1,500	
	121	5,867	5,025	842	5,025	12,750			17,775
	122	6,608	6,457.4	210.6	7,748 88	6,800			14,548 88
	123	4,883.8	3,888.4	995.4	3,110 72	200			3,310 72
24	124	3,756.6	2,769	987.6	2,076 75				2,076 75
	125	3,707.7	2,426.5	1,281.2	1,698 55			320 30	1,378 25
	126	3,707.7	2,133.3	1,574.4	1,493 31			472 32	1,020 99
	112	6,591.2	6,591.2		3,954 12	(2 North, $2,400) (West, 1,000) 5,100 (South, 1,700)			9,054 72
	113	7,838.8	7,626.1	212.7	4,575 66				4,575 66
	114	9,086.4	6,248.8	2,837.6	4,061 72			567 52	3,494 20
N. of	115	5,011.2	2,354	2,657.2	1,530 10			664 30	865 80
So. of	115	5,323.2	1,840.4	3,482.8	1,196 26			870 70	325 56
N. of	116	6,799.7	1,530	5,269.7	1,071		$300	1,071	300
So. of	116	4,782.7	609.4	4,173.3	426 58			426 58	
	125	4,757	434.1	4,322.9	434 10			434 10	
	126	5,143	630	4,513	630			630	
	129	1,500	336.2	1,163.8	353 01			353 01	
	130	1,363	254.2	1,108.8	279 62			279 62	
	131	1,767	238.2	1,528.8	273 93			273 93	
	131	2,423.3	2,423.3		1,332 81				1,332 81
	132	2,197.9	2,197.9		1,208 84				1,208 84
	133	1,972.5	1,972.5		1,084 87				1,084 87
	134	1,932.3	1,932.3		1,159 38				1,159 38
	101	12,687	2,626	10,061	3,151 20			3,151 20	
	102	8,623.5	8,241	382.5	10,301 25	10,400			20,701 25
	103	9,812	7,304.8	2,507.2	6,209 08			501 44	5,707 64
	104	9,812	5,250.8	4,561.2	4,200 64	4,500		1,140 30	7,560 34
	105	9,812	3,199.2	6,612.8	2,399 40	(North, 400) (South, 1,000)	1,400	1,653 20	2,146 20
	106	9,812	1,142.4	8,669.6	799 68			799 68	
	107	9,812	3.2	9,808.8	2 08			2 08	
	110	11,670	2,350	9,320	1,645			1,645	

Schedule I—Continued.

Description of the parcel.	Number of square feet in the parcel.	Number of square feet taken.	Number of square feet not taken.	Compensation for land taken.	Compensation for buildings taken.	Damages to remainder of parcel, including damages to the buildings.	Benefits to remainder of the parcel.	Award being for compensation and damages, less benefits.
138	4,405	50.7	4,354.3	27 88			27 88	
139	4,754	809.3	3,944.7	485 58			485 58	
140	3,874.3	862.8	3,011.5	560 82			560 82	
141	6,248.4	2,762.6	3,485.8	2,071 95			871 45	1,200 50
82	9,413.5	8,371.1	1,042.4	2,092 77				2,092 77
83	9,500	6,368.8	3,131.2	1,592 20				1,592 20
89	29,530	2,224.6	27,305.4	177 97			177 97	
90	19,108	1,073	18,035	85 84			85 84	
72	13,199.2	1,152.8	12,046.4	1,152 80			1,152 80	
73	7,867	1,000	6,867	600			600	
74	7,867	1,000	6,867	450			450	
75	7,867	1,000	6,867	450			450	
76	7,867	1,000	6,867	400			400	
77	7,867	1,000	6,867	370			370	
78	7,867	1,002.3	6,864.7	350 80			350 80	
79	7,867	7,435.9	431.1	2,602 56				2,602 56
80	7,867	6,941.5	925.5	2,429 52				2,429 52
81	11,833.4	1,077.4	10,755.7	323 31			323 31	
				$190,167 26	$54,050	$1,700	$40,395 40	$205,521 86

25 SCHEDULE II.

Appraisement of Damages to Parcels Injured by the Abandonment of Streets or Parts of Streets as Public Highways.

Description of parcel injured.	Number of square feet therein.	Street abandoned.	Damages.
West part lot 47 and north 10 feet of lots 148 to 152, inclusive.	6,988.2	Fifteenth street...	$3,144 69
Lot 50	8,538	" " ...	3,201 75
South part lot 53	2,435.4	" " ...	608 85
Lot 72	13,199.2	Sixteenth " ...	600
			$7,555 29

26 SCHEDULE III.

Assessment of One-half of Foregoing Award on Property Benefitted.

Total amount of award for land taken, as set forth in Schedule I	$190,167 26	
	54,050	
	1,700	
		$245,917 26
Total amount of award because of the abandonment of streets or parts of streets as public highways, as set forth in Schedule II		7,555 29
Total award		$253,472 55
Amount to be assessed on property benefitted, being one-half of total award		$126,736 27

Assessed as follows:

Description of parcel.	Number of square feet therein.	Amount of assessment.
Lot 44	3,229.7	$2,939 02
East 47	3,420	1,312 48
48	10,617	1,741 18
49	11,530.3	1,890 96
51	16,079.5	3,414 81
52	7,097.3	2,327 91
North 53	8,020.9	3,946 28
S. 148	2,417.3	991 08
149	1,785.8	732 17
150	1,878.6	770 22
151	1,976	810 16
152	2,628.7	1,077 76
54	2,242.7	2,040 85
122	721.5	295 81
55	6,534.4	2,143 28
56	402.6	132 05
58	10.2	2 92
59	462	132 59
60	1,118.8	321 09
61	1,788	1,012 90
62	4,430 5	1,362 37
68	3,247.7	932 08
69	4,050.2	2,377 40
70	4,852.8	1,392 75
71	5,655.2	1,738 97
118	3,597.4	2,365 29
119	3,009	1,418 74
27 120	4,367	1,790 47
121	842	345 22
122	210.6	103 61
123	995.4	326 49
124	987.6	303 68
125	1,281.2	367 70
126	1,574.4	924 17
113	212.7	52 32
114	2,837.6	756 22
North 115	2,657.2	708 14
South 115	3,482.8	928 16
North 116	5,269.7	1,512 40
South 116	4,173.3	1,197 73
125	4,322.9	1,772 38
126	4,515	1,850 33
129	1,163.8	501 01

Description of parcel.	Number of square feet therein.	Amount of assessment.
130	1,108.8	$500 06
131	1,528.8	720 82
101	10,061	4,950 01
102	382.5	196 02
103	2,507.2	873 75
104	4,561.2	1,496 07
105	6,612.8	2,033 43
106	8,669.6	2,488 17
107	9,808.8	2,314 04
110	9,320	2,674 84
138	4,354.3	981 89
139	3,944.7	970 39
140	3,011.5	802 56
141	3,485.8	1,071 88
82	1,042.4	106 84
83	3,131.2	320 94
89	27,305.4	2,798 60
90	18,035	739 43
72	12,046.4	4,939 02
73	6,867	1,689 28
74	6,867	1,266 96
75	6,867	1,266 96
76	6,867	1,126 18
77	6,867	1,041 72
78	6,864.7	985 08
79	431.1	61 86
80	925.5	132 80
81	10,755.7	1,322 95
84	9,500	1,168 50
28 85	9,500	1,558
86	9,500	1,752 75
87	9,500	1,947 50
88	17,244.4	6,662 13
91	14,077	2,008 63
95	9,812	1,208 02
96	9,812	1,409 17
97	9,812	1,811 46
98	9,812	1,811 46
99	9,812	2,012 61
100	9,812	2,413 40
108	9,812	1,912 60
109	9,812	1,448 38
127	3,463	567 93
128	2,567.3	579 05
129	3,274.8	671 33

Description of parcel.	Number of square feet therein.	Amount of assessment.
130	3,982.2	$734 72
135	3,679.5	452 58
136	3,679.5	829 73
137	3,727.8	840 62
		$126,736 27

29 *Protest of Owner.*

Filed Jan. 14, 1896.

WASHINGTON, D. C., *January* 14, 1896.

To the clerk of the supreme court of the District of Columbia, sitting as a district court.

SIR: I hereby enter my protest against the award made by the jury of condemnation in the case of the Denison & Leighton subdivision, lot No. 113.

The award for damages is $4,575.66 and the *assessment* for *benefit* $52.32. As I could have borrowed on this property three years ago from a well known and reputable real-estate firm the amount now awarded as damages, it is clear to my mind that this award is not an equitable one, while the amount assessed as benefit is upon an acute angle which has a base of 14 feet and a side of 30 feet. As a lot of this size and shape is not available for building purposes under the laws of this District, I am at a loss to know why I should be made to pay a *penalty* of $52.32 for such a "benefit."

Respectfully yours, JENNIE F. SKINKLE,
Owner of Lot No. 113.

No. 24 Grant place N. W.

30 *Motion for New Trial.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Suburban Subdivision known as Dennison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, in Section One of the Map of Permanent System of Highways. No. 419.

And now come the defendants, Donald McPherson and Mark F. Finley, by their attorneys, and move the court to set aside the verdict rendered in the above-entitled cause and grant them a new trial for the following reasons:

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the law.
3. Because the verdict is unjust and unreasonable.
4. Because of errors of law of the presiding justice in his rulings and instructions at the trial, to which exceptions were taken at the trial by these defendants and allowed by the court.
5. Because the damages found and allowed for the taking of the land are insufficient.
6. Because the benefits found under section 11 of the act of Congress entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," approved March 2nd, 1893, are excessive.
7. Because the assessment against the land benefited thereby of one-half of the amount awarded by the jury as damages for each highway or reservation or part thereof is illegal and void.
8. Because said act of Congress is in violation of article five (5) of the amendment of the Constitution of the United States and is void, in that the said act makes no provision for the payment of
31 just compensation to the owners for the taking for public use of the private property involved in these proceedings.
9. Because the proceedings had and to be had under said act of Congress are and the purpose of the same is for the benefit of the general public in the District of Columbia, and the provision in said act requiring one-half of the expense and cost thereof to be assessed upon property to be found by the jury in said act provided for to be benefited thereby is in violation of article five (5) of the Constitution of the United States and is void.
10. Because all of the provisions of said act of Congress are vague and uncertain and incapable of enforcement at law and therefore void.

DONALD McPHERSON,
CHAPIN BROWN,
Attorneys for Defendants.

32 *Motion for New Trial.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States.

In Re Suburban Subdivision known as Dennison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, in Section One of the Map of Permanent System of Highways. No. 419.

And now come the defendants Frederick A. Schmidt and Marie Schmidt, by their attorneys, and move the court to set aside the verdict rendered in the above-entitled cause and grant them a new trial for the following reasons:

1. Because the verdict is contrary to the evidence.

2. Because the verdict is contrary to the law.

3. Because the verdict is unjust and unreasonable.

4. Because of errors of law of the presiding justice in his rulings and instructions at the trial, to which exceptions were taken at the trial by these defendants and allowed by the court.

5. Because the damages found and allowed for the taking of the land are insufficient.

6. Because the benefits found under section 11 of the act of Congress entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," approved March 2, 1892, are excessive.

33 7. Because the assessment against the land benefited thereby of one-half of the amount awarded by the jury as damages for each highway or reservation or part thereof is illegal and void.

8. Because said act of Congress under which these proceedings are had is in violation of article five (5) of the amendment- of the Constitution of the United States and is void, in that the said act makes no provision for the payment of just compensation to the owners for the taking for public use of the private property involved in these proceedings.

9. Because the proceedings had and to be had under said act of Congress are, and the purpose of the same is, for the benefit of the general public in the District of Columbia, and the provision in said act requiring one-half of the expense and cost thereof to be assessed upon property to be found by the jury in said act provided for to be benefited thereby is in violation of article five (5) of the Constitution of the United States and is void.

10. Because all of the provisions of said act of Congress are vague and uncertain and incapable of enforcement at law and therefore void.

CHAPIN BROWN,
A. H. O'CONNOR,
Attorneys for Above-named Defendants.

34 *Motion to Set Aside Verdict.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton Subdivision. Case No. 419.

John B. Henderson and Mary F. Henderson, his wife, now come and say that the said John B. Henderson is the owner in fee of lot 110, in the said subdivision of Dennison and Leighton, and that the said Mary F. Henderson is the owner in fee of lots 98, 106, 109, and the north half of lot 108 in the said subdivision, and they now move the court to set aside the verdict in this cause, so far as it relates to the property above named, and grant them a new trial or assessment of damages and benefits for the reasons following, to wit:

1. The verdict or award of the jury is inequitable and unjust and against the law and evidence in this case.

2. The court erred in admitting the introduction of improper evidence before the jury.

3. The court erred in excluding legal and competent evidence from the consideration of the jury.

4. The court erred in the giving of instructions to the jury and in declaring to them the law applicable to this case.

5. The court erred in overruling and refusing declarations of law and instructions to the jury, as prayed for by these defendants and by other defendants in the cause.

6. The verdict of the jury is partial, unequal, and unjust, and not justified nor supported by the law, the evidence, or the instructions of the court.

7. The form of the verdict is such that no judgment can be rendered thereon, either for condemnation of right of way or for the collection of the damages or benefits intended to be assessed.

8. Neither the pleadings nor the verdict of the jury disclose any parties in the case, plaintiff or defendant, and any judgment rendered thereon will be wholly without sanction or power of enforcement.

JOHN B. HENDERSON,
For the Above-named Owners.

35 *Motion in Arrest of Judgment.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton Subdivision. Case No. 419.

John B. Henderson and Mary F. Henderson, his wife, now come and say that the said John B. Henderson is the owner in fee of lot 110, in the said subdivision of Dennison and Leighton, and that the said Mary F. Henderson is the owner in fee of lots 98, 106, 109, and the north half of lot 108, in the said subdivision, and move the court to arrest the judgment in this case for the following reasons, to wit:

1. Neither the pleadings, the process, nor the form of trial in this case will authorize, justify, or support a judgment on the verdict rendered.

2. The pleadings and proceedings in the case wholly fail to state in whose name the interest in the land proposed to be condemned shall be vested, or whether that interest shall be a fee-simple title or a mere easement, known as the "right of way," and the verdict of the jury is equally defective.

3. Said pleadings and proceedings wholly fail to state in whose name the judgment for the collection of damages assessed shall or may be enforced, and the verdict of the jury is equally indefinite and uncertain.

4. Neither the pleadings, the process, the trial, nor the verdict of the jury will enable the court to determine whether the judgment shall be in favor of the District of Columbia for the benefits assessed; and, if so, whether such judgment shall be joint or several against the tracts of land benefited, or joint or several against the owners of such tracts, or whether such judgment, if rendered, shall be in favor of each lot of land damaged or its owner, and against other tracts or the owners thereof who may be benefited, and whether such judgment or judgments shall be joint or several.

JOHN B. HENDERSON,
For the Owners Above Named.

36 *Motion for New Trial.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision in Sec. One of Map of Permanent System of Highways. No. 419.

And now comes James B. McLaughlin, owner of lots 129 and 130 in these proceedings mentioned, and moves the court to set aside the verdict rendered in above matter, and that said verdict be not confirmed as to said property.

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to law.
3. Because the verdict is unjust and unreasonable.
4. Because of errors of law of the presiding justice in his rulings on the evidence and instructions at the hearing, to which exceptions were taken and allowed by the court.
5. Because the damages as found and allowed for the taking of the land and buildings thereon are insufficient.
6. Because of the rulings of the court and its failure to instruct the jury that the building regulations did not apply as to parking in this subdivision.
7. Because the assessment against the land benefited whereby one-half of the amount awarded by the jury as damages for each highway and reservation is illegal and void.
8. Because the benefits found are excessive.
9. Because the act of Congress under which these proceedings are had is in violation of article 5 of the amendments of the Constitution of the United States and is void, in that the said act makes no provision for the payment of just compensation to the owners for the taking for public use of the private property involved in these proceedings.

37 10. Because the proceedings had and to be had under said act of Congress are, and the purpose of the same is, for the benefit of the general public in the District of Columbia, and the provision in said act requiring one-half of the expense and cost

thereof to be assessed upon property to be found by the jury in said act to be provided for to be benefited thereby is in violation of said article five of said Constitution.

11. Because the said act of Congress is vague, uncertain, and incapable of enforcement and administration and therefore void.

E. H. THOMAS,
Proctor for Above Owner.

38 *Motion to Set Aside Verdict.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In the Matter of the Suburban Subdivision known as Dennison & Leighton's Subdivision of a Part of Mt. Pleasant and Pleasant Plains, in the District of Columbia, in Section 1 of the Map of Permanent System of Highways. Dist. Doc. 419.

Now comes William W. Townsend, the owner of lot numbered forty-nine in said subdivision, by his attorney, and moves the court to set aside the verdict of the jury rendered herein as to said lot forty-nine, for the following reasons:

1. Because said verdict is contrary to law.
2. Because said verdict is contrary to the evidence.
3. Because said verdict is directly contrary to the instructions of the court to the jury.
4. Because said verdict, as respects said lot, is palpably unjust and unreasonable.

ERNEST L. SCHMIDT,
Attorney for W. W. Townsend, Owner.

39 *Motion for New Trial.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

Now comes F. B. Abbot, the owner of lot No. 69, described in the proceedings in this case, and one of the parties to said proceedings, and, by his attorney, moves the court that the verdict of the jury herein be set aside and a new trial granted, and assigns the following grounds for said motion:

1. The verdict is unjust and unreasonable and uncertain.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the instructions of the court.
4. The jury charged against the compensation allowed by the jury

in respect to so much of said lot sixty-nine as is included within the limits of the proposed extension of Sixteenth street, shown upon the plat attached to the petition in this case and proposed to be taken for said highway, the sum of $1,215.00 as the amount of the benefit that the jury found would result to the remainder of said lot not taken, and deducted the same from the value of said lot taken as aforesaid.

5. The jury charged and assessed against so much of said lot as is not to be taken or included within the limits of the extension shown by said plat the sum of $2,377.40 as the amount of the benefits that the jury found would result to the said remainder of said lot from the extension of the streets and avenues described in said plat.

40 6. The jury ignored and excluded from their consideration evidence which it was their duty to consider.

7. The court committed errors in its rulings during the trial in admitting and excluding evidence against the respondent's objections, and to which exceptions was duly taken.

8. The court erred in granting certain instructions to the jury and refusing others; to which action of the court said respondent duly took exception, as is shown on the minutes of the court.

9. The court erred in denying the respondent's motion to discharge the jury and to dismiss this proceeding; to which this respondent duly took exception.

NATH'L WILSON,
Att'y for F. B. Abbot.

41 *Abbott's Motion in Arrest of Judgment.*

Filed January 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant.
District Court, No. 419.

Now comes F. B. Abbott, the owner of lot No. 419, described in the proceedings in this case, and one of the parties to said proceedings, and moves the court to arrest judgment on the verdict in this case and to enter no judgment on said verdict for the following reasons:

1. Because the law under which said jury was impanelled and in pursuance of which the proceedings in this case have been had is void and of no effect and contrary to the Constitution of the United States.

2. Because the entire proceedings in this case are in violation of the rights of the said F. B. Abbott as secured to him by the Constitution of the United States.

NATH'L WILSON,
Att'y for F. B. Abbott.

Motion to Reinstate and to Dismiss.

Filed January 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison & Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

Now comes F. B. Abbott, the owner of lot No. 419, described in the proceedings in this case, and one of the parties to said proceedings, and renews the motion heretofore made to dismiss this proceeding for the reasons stated in said motion.

NATH'L WILSON,
Att'y for F. B. Abbott.

42 *Motion to Set Aside and Vacate Verdict.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

And now comes Arthur H. Whitlark, owner of lots 119 and 120, as the same are laid down and designated on the plat of said subdivision filed with the petition in this cause, by his attorneys, and moves the court to set aside and vacate the verdict of the jury in this case in respect to the lots aforesaid for the reasons and upon the grounds following:

1. Because said verdict is unjust, unreasonable, and uncertain.
2. Because the verdict is contrary to the evidence.
3. Because the verdict is contrary to the instructions of the court.
4. Because of errors of law committed by the court in the progress of the trial of the case and noted upon the minutes of the court.
5. Because the compensation awarded by the said verdict to the owner of said lots for the ground taken for a permanent right of way is grossly inadequate and contrary to the weight of evidence.
6. Because the jury by its verdict has found that the residue of said lots not taken for a permanent right of way will be benefited by taking a part thereof for said purpose, and have allowed said supposed benefits and deducted the same from the compensation ascertained and allowed by said verdict for the part of said lots taken.
7. Because the jury in making its award for the parts of lots 119 and 120 included within the lines of the said highways, as specified on the map filed with the petition in this case, has deducted from the compensation allowed by said verdict for the parts of lots

43 so taken for said highways the following-named sums as benefits to the residue of said lots: Lot 119, $1,000; lot 120, $1,500.

8. Because no compensation is allowed for taking a portion of the dwelling-house situated upon said lots.

WILSON & BARKSDALE,
Attorneys for Arthur H. Whitlark.

Motion for New Trial.

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

And now comes Arthur H. Whitlark, owner of lots 119 and 120, as the same are laid down and designated on the plat filed with the petition in this case, and moves the court to set aside the verdict in this case and grant him a new trial in respect to said lots, because no damages whatever are awarded for taking a portion of the dwelling-house located on lots 119 and 120, and the award of — damages for the part of said lots taken is grossly inadequate and contrary to the evidence in this case.

WILSON & BARKSDALE,
Attorneys for Arthur H. Whitlark.

44 *Motion in Arrest of Judgment.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

Now comes Arthur H. Whitlark, owner of lots 119 and 120, as the same are laid down and designated on the plat of said subdivision filed with the petition in this cause, by his attorneys, and moves the court to arrest judgment on the verdict in this case and to enter no judgment thereon for the following reasons:

1. Because the law under which the said jury was impanelled and pursuant to which the proceedings in this case have been had is contrary to the Constitution of the United States.

2. That the entire proceedings in this case are in violation of the rights of said owner of said lots as secured to him by the Constitution of the United States.

WILSON & BARKSDALE,
Attorneys for Arthur H. Whitlark.

45 *Motion to Set Aside and Vacate Verdict.*

Filed January 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

And now come Emma Fitzgerald, owner of lot 68 and the north one-half of lot 69, on the plat of said subdivision filed with the petition in this cause; Stanley Pierce, owner of lot 57; Charles W. Rowzee, owner of south half of lot 69; Mary B. Armes, owner of lot 123; George T. Stone, owner of lots 124, 125, and 126; Charles Hampson and Edward Mahon, owners of the south one-half of lot 112; J. H. Syphod, owner of lot 125 and part of 126, on Kennesaw avenue; John M. Henderson, owner of lots 131, 132, 133, and 134; John E. Reubsam, owner of lot 103; Mary Sleeman, owner of the south half of lot 104; John W. McMahon, owner of south half of lot 105; Elizabeth Smith, owner of north twenty feet of lot 105; Mrs. Watson Farrer, owner of lot 107; Dorliski E. Parker, owner of lot 138, and Charles H. Armes, owner of the south 47 feet front of lot 53, and David Ingalls, owner of lot 59, and —— Company, owner of lot 60, by their attorney, and move the court to set aside and vacate the verdict of the jury in this case in respect to the several lots and parts of lots hereinabove mentioned for the reasons and upon the grounds following:

1. Because said verdict is unjust, unreasonable, and uncertain.
2. Because the verdict is contrary to the evidence.
3. Because the verdict is contrary to the instructions of the court.

46 4. Because of errors of law committed by the court in the progress of the trial of the case and noted upon the minutes of the court.

5. Because the compensation awarded by the said verdict to said lot-owners and each of them for the ground taken for a permanent right of way is grossly inadequate and contrary to the weight of evidence.

6. Because the jury, by its verdict, has found that the residue of said several lots and parts of lots not taken for a permanent right of way will be benefited by taking a part thereof for said purpose, and have allowed said supposed benefits and deducted the same from the compensation ascertained and allowed by said verdict for the part of said several lots and parts of lots taken.

7. Because the jury, in making its award for the parts of said several lots included within the lines of the said highways as specified on the map filed with the petition in this case, has deducted from the compensation allowed by said verdict for the parts of said lots so taken for said highways the following-named sums as benefits to the residue of said several lots respectively: Lot No. 131,

$273.93; lot No. 68, $811.92; lot No. 69, $1,215; lot No. 103, $501.44; lot 107, $2.08; lot No. 104, $1,140.30; lot No. 105, $1,653.20; lot 138, $2,788; lot 60, $279.70.

8. Because the jury has by its verdict ap-portioned the sum of $126,736.27 upon certain lots and parts of lots of ground in said subdivision, and in so doing has assessed and charged against said several lots the sums following, to wit: Lot No. 68, $932.08; lot 69, $2,377.40; lot 123, $326.49; lot 124, $303.68; lot 125, $367.70; lot 126, $924.17; lot 125, $1,772.38; lot No. 126, $1,850.33; lot No. 131, $720.82; lot No. 103, $873.75; lot 104, $1,496.07; lot No. 105, $2,033.43; lot 107, $2,314.04; lot 138, $981.89; lot No. 59, $132.59; lot No. 60, 321.09.

W. L. COLE,
Attorney for said Lot-owners.

47 *Motion in Arrest of Judgment.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton's Subdivision of Mount Pleasant. No. 419, District Court.

And now come Emma Fitzgerald, owner of lot numbered sixty-eight (68) and the north one-half of lot sixty-nine (69) on the plat of said subdivision filed with the petition in this case; Stanley Pierce, owner of lot fifty-seven (57); Charles W. Rowzee, owner of south half of lot sixty-nine (69); Mary B. Armes, owner of lot one hundred and twenty-three (123); George T. Stone, owner of lots 124, 125, and 126; Charles Hampson and Edward Mahon, owners of the south one-half of lot 112; J. H. Syphod, owner of lot 125 and part of 126; John M. Henderson, owner of lots 131, 132, 133, and 134; Mary Sleeman, owner of the south one-half of lot 104; John W. McMahon, owner of south half of lot 105; Elizabeth Smith, owner of north twenty feet of lot 105; Mrs. Watson Farrer, owner of lot 107; Dorliski E. Parker, owner of lot 138, and Charles H. Armes, owner of the south forty-seven feet front of lot 53, by their attorney, and move the court to arrest judgment on the verdict in this case and to enter no judgment thereon for the following reasons:

1. Because the law under which the said jury was impanelled and pursuant to which the proceedings in this case have been had is contrary to the Constitution of the United States.

2. That the entire proceedings in this case are in violation of the rights of said lot-owners as secured to them by the Constitution of the United States.

W. L. COLE,
Att'y for Owners.

48 *Motion to Set Aside Verdict, &c.*

Filed January 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison and Leighton Subdivision of Mount Pleasant. District Court, No. 419.

And now come Elizabeth Smith, owner of the north twenty feet of lot numbered 105, and John W. McMahon, owner of the south half of said lot 105, as the same is laid down and designated on the plat filed with the petition in this case, and move the court to set aside the verdict in this case and grant them a new trial in respect to said parts of lot 105, because the sum of fourteen hundred dollars awarded as damages to the residue of said lot 105 not taken for the extension of said Sixteenth street (including damages to the buildings) is grossly inadequate and contrary to the evidence in this case.

W. L. COLE,
Att'y for Owners.

49 *Motion to Set Aside Verdict.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Denison and Leighton's Subdivision of Mount Pleasant. District Court, No. 419.

And now comes Charles H. Armes, owner of the south forty-seven feet of lot 53, as the same is laid down and designated on the plat filed with the petition in this case, and moves the court to set aside the verdict in this case and grant him a new trial in respect to the said part of lot 53, because the sum of $608.85 damages awarded by said verdict to the owner of said lot numbered fifty-three because of the abandonment of part of Fifteenth street is grossly inadequate and contrary to the evidence in this case.

W. L. COLE,
Attorney for said Lot-owner.

50 *Motion to Set Aside Verdict, &c.*

Filed Jan. 15, 1896.

In the Supreme Court of the District of Columbia.

In Re Denison and Leighton's Subdivision of Part of Mount Pleasant and Pleasant Plains. District Court, No. 419.

Now comes Thomas W. Hunster, owner of the north part of lot numbered fifty-three (53); Alice Eugenia Snyder, owner of the

south part of lot numbered one hundred and fifteen (115); William F. Snyder, owner of the north part of lot numbered one hundred and sixteen (116), and Theodore A. Harding, owner of lots numbered one hundred and fifty (150), one hundred and fifty-one (151), and one hundred and fifty-two (152), as shown by the plat filed with the petition in this case, by their attorney, and move the court to set aside and vacate the verdict of the jury in this case in respect to the several lots and parts of lots hereinabove mentioned for the reasons and upon the grounds following:

1. Because said verdict is unjust, unreasonable, and uncertain.
2. Because the verdict is contrary to the evidence.
3. Becasse the verdict is contrary to the instructions of the court.
4. Because of errors of law committed by the court in the progress of the trial of the case and noted upon the minutes of the court.
5. Because the compensation awarded by the said verdict to said lot-owners and each of them for the ground or land taken for a permanent right of way is grossly inadequate and is contrary to the weight of the evidence.
6. Because the jury by its verdict has found that the residue of said several lots and parts of lots not taken for a permanent
51 right of way will be benefited by taking a part thereof for said purpose, and have allowed said supposed benefits and deducted the same from the compensation ascertained and allowed by said verdict for the part of said several lots and parts of lots taken.
7. Because the jury, in making its award for the parts of said several lots and parts of lots taken from the said lots and parts of lots included within the lines of the said highways as specified on the map filed with the petition in this case, has deducted from the compensation allowed by said verdict for the parts of said lots so taken for said highways the following-named sums as benefits to the residue of said several lots and parts of lots, respectively, to wit: North part of lot No. 53, two thousand dollars ($2,000); south part of lot No. 115, eight hundred seventy dollars and seventy cents ($870.70); north part of lot No. 116, one thousand and seventy-one dollars ($1,071.00); lot No. 150, four hundred nine dollars and eighty cents ($409.80); lot No. 151, four hundred and forty-eight dollars ($448.00), and lot No. 152, one thousand seventy-four dollars and fifty cents ($1,074.50).
8. Because the jury has by its verdict apportioned the sum of $126,736.27 upon certain lots and parts of lots of ground in said subdivision, and in so doing has assessed and charged against the said several lots and parts of lots the following sums, respectively, to wit: North part of lot No. 53, three thousand nine hundred and forty-six dollars and twenty-eight cents; south part of lot No. 115, nine hundred twenty-eight dollars and sixteen cents; north part of lot No. 116, one thousand five hundred and twelve dollars and forty cents; lot No. 150, seven hundred seventy dollars and twenty-two cents; lot No. 151, eight hundred ten dollars and sixteen cents, and lot No. 152, one thousand seventy-seven dollars and seventy-six cents.

9. Because the benefits found are excessive and illegal.

52 10. Because the assessment against the land claimed to be benefited thereby of one-half of the amount awarded by the jury as compensation and damages for each highway or part thereof is illegal and void.

11. Because the act of Congress under which these proceedings are had is in violation of article V of the amendments to the Constitution of the United States of America and is void, in that said act makes no provision for the payment of just compensation to the owners for the taking for public use of the private property involved in these proceedings.

12. Because all of the provisions of said act of Congress are vague and uncertain and incapable of enforcement at law, and therefore void.

J. H. LICHLITER,
Attorney for said Lot-owners.

53 *Motion for New Trial.*

Filed Jan. 16, 1896.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mt. Pleasant and Pleasant Plains, in the District of Columbia, etc. District Court, No. 419.

And now come Donald McPherson and Mark F. Finley, by their attorney, and move the court to set aside the verdict rendered in the above-entitled cause and grant them a new trial for the following reasons:

1. Because the damages or compensation award- by the jury in said verdict to said lot-owners and each of them for the land taken under said act for a permanent right of way is grossly inadequate and contrary to the evidence.

2. Because the jury by its verdict found that the remainder of said several lots and parts of lots not taken for a permanent right of way would be benefited by the taking of a part thereof for said purpose, and have allowed said supposed benefits, which have not accrued and may never accrue, and deducted the same from the damages or compensation ascertained and allowed by said jury in said verdict for the part of said several lots and parts of lots taken, which is illegal and unjust and not in accordance with the facts or evidence.

3. Because the verdict was grossly unequal and inequitable, in that the land taken to widen Kenesaw avenue abutting on lots 73, 74, 75, 76, 77, 78, 79, 80, and 81 was all taken from these lots (the lots of the defendants in fee-simple) and never from the op-

54 posite abutting lots, while the benefit of said widening, if any, inured to said lots, no part of which were taken; that

for said taking, which was for a large amount (about 10,000 sq. feet), no compensation whatever was awarded by said jury; that, notwithstanding the said taking from defendants' lots, their assessment or charge for supposed benefits received no consideration therefor and was equal or greater, under section 15 of said act, than the benefits assessed on lots opposite said lots 73 to 81, inclusive, of the defendants.

DONALD McPHERSON,
Att'y for Defendants.

Motion for New Trial.

Filed Jan. 16, 1896.

In the Supreme Court of the District of Columbia, United States District Court of the District of Columbia.

In Re Denison and Leighton's Subdivision, etc. No. 419.

Now come Katharine S. Foos, Elizabeth Varney, Isabella Varney, Nancy M. Cushing, Susan A. Berry, and Mary A. Cushing, by their attorney, and move the court for a new trial in the above cause. Among the grounds of this motion are the following:

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the law.
3. Because the verdict is unjust and unreasonable.
4. Because of the errors of law of the presiding justice in his rulings and instructions at the trial to which exceptions were taken by some defendants for the benefit of all and allowed by the court.

55 5. Because the compensation and damages found and allowed are insufficient.

6. Because the benefits found are excessive and are based upon guess-work as to future prices, which are dependent upon the financial condition of the country and upon improvements which may never be made.
7. Because the benefits found cannot constitutionally be deducted from the compensation for property taken.
8. Because the assessment against the land in said subdivision of one-half of the amount awarded by the jury as damages and compensation is unconstitutional and void and not authorized by the law.
9. Because the act of Congress under which these proceedings are had is an attempt to confound proceedings under the doctrine of eminent domain with proceedings for taxation, and that the said act does not provide for just compensation to the owners for the taking of private property for public use.
10. Because the proceedings had and to be had under said act of Congress are, and the purpose of the same is, for the extension of the capital city of the nation and for the benefit of the people of the United States, and the expense and cost incurred under it should be

paid by the Government of the United States, and that no part of it should be assessed against the proprietors of the land in the subdivision or against the District of Columbia.

11. Because all the important provisions of the said act of Congress are vague and uncertain, incapable of enforcement at law, and therefore void.

WILLIAM BIRNEY, *Attorney.*

Service by copy this January 16, 1896, acknowledged.
S. T. THOMAS, *Att'y D. C.*

56 *Motion to Set Aside Verdict.*

Filed Jan. 17, 1896.

In the Supreme Court of the District of Columbia.

In Re Denison & Leighton's Subdivision of Part of Mt. Pleasant. District Court, No. 419.

Now comes Martha H. Wheeler, owner of the north one-half of lot 114, in above subdivision, and, by her attorney, moves the court that so much of the verdict returned by the jury in this case as pertains to lot 114 be set aside on the following grounds:

That before this case was given to the jury, at the request of the attorney for the said Martha H. Wheeler and with the consent of the attorney for the District of Columbia, the jury were directed by the court to make separate returns for the north one-half and the south one-half of said lot 114, which they have failed to do, making instead a return for the lot as a whole.

F. W. McREYNOLDS,
Attorney for Martha H. Wheeler.

57 *Opinion of the Court.*

Filed January 27, 1895.

In the Supreme Court of the District of Columbia.

In Re the Condemnation of Lands in Subdivision No. 419 for Public Highways.

At the commencement of these proceedings a motion was made on behalf of the owners of some of the ground sought to be condemned that the jury be discharged and the proceeding dismissed.

It was understood then that the motion should be overruled *pro forma* in order that the questions made should be carried up by appeal, and the court was not requested to consider them or pronounce any formal opinion.

But since the case was submitted to the jury and a finding has been made by them the questions involved in that motion have again been brought forward, and the court is moved to reconsider them

and decide them upon their merits, and to give the same relief that was then applied for.

I have felt bound to entertain this motion, especially as it has seemed to me that we can better appreciate the merits or defects of the law under which we are acting, now that we have seen something of its practical operation, than we could beforehand.

Without examining in detail the motion which was filed at the beginning of this proceeding, which was quite voluminous, it is sufficient to say that the substance of the grounds set forth in it is

58 that the act of Congress under which this condemnation is made is unconstitutional because it provides for taking private property for public use without providing for just compensation to the owners, as the Constitution requires.

The act of Mar. 2, 1893, under which this proceeding was initiated, requires the Commissioners to prepare in sections a plan for the extension of a permanent system of highways over the District of Columbia, and when the plan as to any section is adopted they are directed to cause a map of the same to be made showing the boundaries and dimensions of the streets, avenues, and roads, and when the map is approved by a commission created by the act it is directed to be recorded. Within thirty days after it is recorded the Commissioners are required to apply to the supreme court D. C. to condemn a permanent right of way for the public over all the land lying within the highways laid out by the Commissioners and indicated on the map *in any existing subdivision*, which is not already dedicated to the public or owned by the U. States or Dist. of Columbia. In the proceeding for the condemnation it is directed that when the use of only part of a parcel is condemned the jury, in assessing damages therefor, "*shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly.*" In another form they are directed to state as to each parcel of land involved in the proceeding "only the amount of compensation, less the benefits, if any, which it (they) shall award in respect thereof."

When the damages to be awarded for each highway or part thereof are ascertained one-half of the amount is to be assessed upon the land benefited by the highway and the other half is to be charged to the general revenues of the District, and the amounts thus assessed against the property benefited are to be a lien on the property and to be collected like special improvement taxes.

It will thus be seen that the subject of *benefits* is twice

59 introduced in the law. If when part of a lot is condemned and taken the remaining part is to derive a special and peculiar benefit from the proposed improvement, as, for example, where from fronting on a narrow alley it acquires instead a front on a spacious avenue, whereby its value is greatly increased, that advantage or benefit is to be valued, and its value is to be deducted from the amount awarded as compensation for the ground taken and for any incidental damage occasioned thereby, or if the benefit equals the damages it is to be set off against and satisfy them. On

the other hand, that general benefit which all the property in the neighborhood derives from the existence of a new and convenient avenue, though it may not abut upon the avenue, is not to be considered in making the award for the ground taken, but an assessment for this general benefit is to be made on all the property which experiences it. The deduction for benefits is referred to the power of eminent domain. It is, in effect, part payment of the compensation to be made to the owner. He is paid, partly it may be, in cash, and partly by the benefits conferred upon his remaining property. The assessment for general benefits, however, is the exercise of the power of taxation; and there seems to be no doubt about the power of a legislature to levy taxes in this form. As the Supreme Court of the United States say in Spencer *v.* Merchant, 125 U. S., 356:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement and to order it to be assessed, either, like other taxes, upon property generally or only upon the lands benefitted by the improvements, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees
60 fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefitted is entrusted to commissioners the owners may be entitled to notice and hearing upon the question whether their lands are benefitted and how much, but the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefitted by the improvement are in fact benefitted; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefitted or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

But when we approach the subject of the *deduction* of benefit we encounter the most vexed question in this branch of constitutional law. We are not to expect much light upon it from the decisions of the Federal courts because the Government of the United States has had little occasion to condemn property for public use outside of the District of Columbia, and I am not aware that in the rare instances that have occurred this question has ever arisen.

But in the State courts the decisions are innumerable and irreconcilable. In some the subject is regulated by constitutional or statutory enactment in different ways; in others it is determined differently by the courts upon general principles.

In some States special benefits are allowed to be deducted, not from the ascertained value of the land taken, but only from the incidental damages allowed in addition to that; in others—but this is generally, perhaps, statutory—there can be no deduction

for benefits at all. In others, again, both special benefits and
61 the general benefits shared in common with the neighborhood or locality can be deducted. In others, again, the special benefits can be deducted from both the ascertained value of the land taken and the incidental damage occasioned by the taking. It would be utterly useless to attempt a review of the authorities, and I do not see how I can do better than acquiesce in the conclusion of those eminent commentators, Judge Cooley and Judge Dillon, that the weight of authority in the State courts favors the last-mentioned view, viz., that the special benefits to an individual lot of which a part is condemned can properly be set off against or deducted from the amount found due as the value of the land appropriated and as special damage to the remainder of the tract or parcel.

Cooley, Con. Lim., pp. 698 to 702; Dillon, Mun. Corp., sec. 625.

But this does not relieve us of the difficulty. The question still remains, What kind of benefit may thus be set off and deducted, and how is it to be ascertained?

It is agreed on all hands that the land taken is to be paid for at its present value, not according to the value determined in the future by the contemplated improvement—Mills on Eminent Domain, sec. 174; Lewis on Eminent Domain, sec. 480—and common justice requires that any deduction from this for supposed benefits should be for benefits which if not immediately realized should be at least so far present as to be certain and presently ascertainable. A municipality, for example, directs a street to be condemned, opened, paved, and graded, and that the benefits to the remaining property shall be deducted from the damages allowed to the owners for the land taken. Here the benefit is certain and easily estimated, and there may be no hardship in paying for the land partly or wholly in these benefits. In the examination of a great many cases I have found none in which this charge of benefits is sanctioned except where the improvement has been peremptorily directed by law to be made. A street or county road has been directed to be laid out, swampy ground has been directed to be drained and
62 reclaimed, or a bridge to be built, or an existing street widened. The owner of land to be affected by the proposed improvement has all the certainty of benefit which legislative ordinance can give him. The jurors who are to estimate the damages know when the work is to be done and what will be the cost, and can easily estimate the benefit to result from it. There is nothing conjectural, illusive, or problematical about it, and this is the class of cases in which I understand the deduction of benefits to be sanctioned by the authorities.

And this would apply equally to general benefits assessed and special benefits deducted.

Examples of this are the case of People *v.* Brooklyn, 14 N. Y., 419, in which a street was ordered to be opened and paved, and the expense was ascertained to be $20,390.25 and was ordered to be assessed on the property benefited; the case of Livingston *v.* Mayor of New York, 8 Wend., 85, where a street was actually opened by the city,

and the peculiar and special benefits were set off or deducted; the case of Genet *v.* Brooklyn, 99 N. Y., 296, where an act was passed for the widening of Sackett street, and the special benefits were required to be deducted from the damages found, and the case of Terry *v.* Hartford, 39 Conn., 286, where a street was actually laid out through a party's lands.

But let us suppose, if so foolish a thing can be conceived of as possible, that Congress should direct the condemnation of land for improvements to be made at some future day and of a character yet to be determined, and require the valuation of the land condemned to be reduced by the possible benefits to the land retained from the mere prospect of undefined improvements in the future. Could that possibly be sustained as just compensation in the sense of the Constitution? There can be but one answer to such a question, and this leads us to the inquiry whether the present case approaches the one supposed or falls within the class before described.

63 The object of the act of March 2, 1893, is declared to be to establish a permanent system of highways in that part of the District of Columbia lying outside of the cities.

A highway is a road open to the public—a main road or thoroughfare.

To be complete, it must be opened. As the supreme court of New Jersey say in State-Gaines Pros. *v.* Hudson County Avenue Commissioners, 37 N. J. L., 12: "The second meaning which may be given to this expression of 'opening said avenue' is that it denotes the operation of clearing the avenue of obstructions. This is the sense in which the term 'to open,' as applied to the construction of public highways, is used in our road acts. By force of that legislation the surveyors of the highways lay out the road and the overseers 'open' them. The term to open in this connection obviously means to clear away the obstructions in the road." The same term is employed in this statute, as we shall see further on, and with the same meaning, as it seems to me.

But the clearing away of all obstructions to travel is not the only thing involved in the opening of a highway to public use. In the case of Weightman *v.* The Corporation of Washington, 1 Black, 39, from the obligation of the city to defray the expenses of keeping a bridge in repair the supreme court deduced the obligation to guaranty its safety and the liability of the city in damages for an accident resulting from want of repair.

In the case of Barnes *v.* District of Columbia, 91 U. S., 540, because the Board of Public Works, as a branch of the District government, had by law the entire control of the streets, avenues, &c., and power to make all regulations which they might deem necessary for keeping them in repair, the District was held liable in damages for an accident occurring on the street because it was in an unsafe condition.

The act of June 25, 1874, 18 Stat., 116, transferred to temporary commissioners all the power and authority of the governor
64 and Board of Public Works of the abolished District government, with certain exceptions not material to the present question.

In addition to that, it provided that an engineer officer should be detailed, who should, *subject to the general supervision and direction of the Board of Commissioners, have the control and charge* of the work of repair and improvement of all streets, avenues, alleys, sewers, *roads, and bridges of the District of Columbia.* That control of the *streets of the city* by the Board of Public Works which was held to make the District government responsible for their safety *was hereby extended to all the roads* in the District, so that there could hardly be a doubt that the District was thereby made a guarantor of their reasonable safety for travel.

By act of June 11, 1878, 20 Stat., 102, the powers and authority and, consequently, the responsibilities of the temporary Commissioners were transferred to the present government of the District.

So that the idea of a highway involves not only an open and unobstructed passageway for travel, but one of guaranteed safety.

What have we under the present legislation?

A contrast is noticeable between the case where a projected highway does *not* lie within the limits of an existing subdivision and the case where it does so lie, as in the case now before us.

In the former case the Commissioners are only to apply to the court, *when in their judgment the public convenience shall require the opening* of the highway, for the condemnation *and opening* of the same, and then the court is first to hear evidence as to whether the public convenience does *in fact require the immediate opening* of the highway, and if the court shall decide that question in the negative there shall be no further proceeding.

This would be the form of proceeding in which the authorities before referred to would countenance the assessment and deduction of benefits.

But the provisions referred to are conspicuously absent
65 from that part of the law which governs the present case.

Where the highway to be condemned runs through *an existing* subdivision, no considerations of public convenience as to opening the highway are to govern the Commissioners, but they are required within thirty days after filing their map to make application to the court not, as in the other case, to condemn *and open* the highway, but simply *to condemn* a permanent right of way for the public.

The principal highway in subdivision 419 which we have been so long examining is Sixteenth street. As laid out upon the map, this passes through enclosures and buildings. Until these are removed, it cannot be open to use. The Commissioners cannot spend a dollar for this purpose without authority of Congress. No such authority is given in this act nor any direction that the street shall be opened. It is not even provided that on any contingency, such as the reasonableness of the award of damages or the appropriation by Congress to pay them, the highway shall be opened, but the law stops at the condemnation of the land, and thus establishes an impassible barrier to any individual improvement without guaranteeing a public one. Until the street is opened no one can use it as a highway and no one could recover damages for injuries sustained

in such unauthorized use, so that the lot-owner, by the mere condemnation which the law authorizes, acquires no right to that which is charged to him as the consideration in part for his land, and he has no assurance when, if ever, he will acquire that right. Meanwhile his land is taken from him because he can put it to no use and because the District may take possession of it without paying him for it in money if these special benefits are charged against it.

Congress *de industria* declines to bear any of the expense of highways outside of Washington and Georgetown, and throws the whole burden on the revenues of the District, so as to make all improvement in that direction contingent upon the condition of the District treasury, so that the benefit lies in the uncertain
66 future and is conjectural. It may be further remarked, as showing how difficult it is to estimate these conjectural benefits, that no grades have been established for these streets, and therefore it cannot be known whether a particular lot will be above or below grade—a very material question to the just ascertainment of benefits, even where benefit is certain to accrue as to time, if at all.

The question then presents itself whether to deduct from or set off against the damages due the owner for part of a lot taken such benefit as above described to the rest of his lot is, to that extent, to pay him that just compensation which the Constitution requires.

It does not seem to me that the State courts go that far.

No Federal decisions directly upon this point have been cited, nor has the question been directly presented before in this District.

Attention has been called to the Revised Statutes, D. C., which do provide, in section 261, that in the condemnation of land for roads the jury shall *take into consideration* the benefit which the road may be to each owner by enhancing the value of his land or otherwise.

But all this is only to be done when in the first place application is made by residents of the county to have a new road laid out or an old one altered, or when the authorities of the District shall deem it conducive to the public interest *to open* a new road or alter an old one. It contemplated, therefore, the actual construction of roads, in which case the benefit is in sight and not conjectural.

But, although this question has not arisen directly and been decided in the Federal courts, both the Court of Appeals, D. C., and the Supreme Court of the United States have used language which is of weight and shows very plainly what their opinions will be when the question directly arises.

67 Thus, in the case of The District of Columbia *v.* Prospect Hill Cemetery *et al.*, Washington Law Reporter, vol. 23, p. 11, where the benefits were attempted to be set off against damages without any statutory authority to do so, the court, through Morris, J., said:

"Most extraordinary and unjustifiable would it be to levy such an assessment before the proposed improvement was even begun; and yet this would be the precise effect of an attempt to set off

against the just compensation payable for land sought to be condemned for the purposes of a street the *possible* benefits that might accrue to adjoining land from the opening of such a street. Even if the just compensation payable under the guaranties of the Constitution could be violently construed as payable in land or in the increased value of land or in some *possible or problematical benefit or advantage* or convenience that would inure to a person, it would be in any event payment for present loss *by a mere promise, that might never be realized*, of future advantages * * *. It is not reasonable to pay for land taken for the public use in promises of increased value for the remainder that may have no foundation in fact."

And so, in the case of Monongahela Nav. Co. *vs.* United States, 148 U. S., 312, Mr. Justice Brewer, while he repudiates the idea that *general* benefits can be made part of the compensation taken, also cites with approbation the case of Isom *vs.* The Mississippi Central R. R. Co., 36 Miss., 300.

There it appeared that the charter of the R. R. Co. authorized it to have land condemned for its road and contained the clause that the jury in estimating the damages shall take into the estimate the benefits resulting to the owners towards the extinguishment of his claim for damages, substantially the same provision as that of the present law.

In that case the court said: "The rule held by this court is this: Under our Constitution the owner of the land is entitled to just compensation for the damage he sustains by the application
68 of his land and property to public use at the time the public make the appropriation of his private property. The value of the property in the market at that time and no other, and the injury then necessarily known to result to the owner as the necessary and immediate consequence of such public use of his property, without reference to the uncertain or remote benefits or disadvantages that may or may not accrue in the future, is what (in legal contemplation) the owner looses. Whatever is *then incapable of definite ascertainment, but rests merely on conjecture, possibility, or probability, dependent upon the future*, cannot be taken into the estimate by the rule of just compensation. It cannot be just to award compensation for injuries that may never happen, nor, on the other hand, can it be just to compensate *present injury* or deprivation of right by the possible or probable benefits which may result at some future time from what is now an admitted injury. To say that the owner shall be paid at any other time or in anything else than the measure of value known to the Constitution, or that he shall receive more or less than the loss or injury *then* capable of definite inquiry and ascertainment, or that his claim to this compensation shall be extinguished by the probable benefits which in the future may result from the construction of a road which may not be finished in sixteen years (the time limited by the charter) cannot by any fair interpretation of the Constitution be regarded as just compensation first made. This provision of the charter, therefore, which requires the "jury in estimating the damages to take into the estimate the benefit resulting to such owner by reason of such road passing

through his land towards the extinguishment of such claim for damages," is subversive of the rights intended to be secured by this clause of the Constitution, and to that extent is void."

69 I endorse these sentiments and consider the language of the Mississippi court strongly applicable to the present case. There is no difference in principle between the taking of private property for the use of a railroad and taking it for the immediate use of the State. In both cases it is taken only in virtue of the right of eminent domain, and in both cases the same just compensation must be made. Congress, by the act of 1893, authorizes the taking of private property for public use and attempts to pay for it partly in benefits to be received in the future, and that contingently. It fails to provide for the just compensation required by the Constitution to be made, and is therefore an unconstitutional appropriation of private property which the courts cannot carry out. It is unnecessary to decide whether the recording of the map amounts to a taking. It is sufficient that the law purports to transfer the title and put the Government in possession when it has only paid a part of the compensation due, and this is a taking without just compensation.

It was contended in argument that the mere fact of recording the map was a benefit, inasmuch as it established the streets and avenues in the sense of settling their lines and boundaries for all future time, and thus furnished a guide for all future improvements; that this was the benefit intended by the act of Congress and is to be presumed to be the benefit deducted by the jury.

The act will not bear this construction. The jury are to consider, not the benefit which the platting or even condemnation of the land may be, but that which the purpose (or object) of the taking of the land may be, and the object of the taking of the land must be to convert it to actual use and not merely to plat it on a map. Section 11 also must be read in connection with section 15. By the latter the same jury that assess the damages in part by deducting benefits are to assess the general benefits on the land benefitted by the

70 *laying out and opening of the highway*, and in doing that they are to make due allowance for any amount that may already have been deducted for the special benefit to what is left of a lot partially taken; but it is plain that the benefits provided for in both sections are of the same kind. As far as their source is concerned they are the benefits to be derived from a completed, established, and opened highway, and not from one merely projected on paper, and as such they are not present, but future and contingent ones. I have no doubt that the jury have endeavored to carry out the law in this sense, and have arrived at the amount of special benefits by deducting the present value of the parts of land left unappropriated from their probable value when these highways are completed and open for use.

If this constitutional question had been pressed before the jury proceeded to act I would have felt obliged to pronounce the law unconstitutional and to arrest all further proceedings under it. If no benefits had been found by the jury there would have been, per-

haps, no occasion to raise the question; but as the jury have found a large amount of special benefits to be deducted from the damages ascertained, the inherent vice of the law has been practically demonstrated, and it becomes my duty to set aside the whole proceeding for the condemnation of the land.

I might stop here, but there are other features in the law as to which some comments are suggested by our experience in this case.

The 10th section of the law provides that one jury may be sworn and one trial had as to all or any of the parcels of land involved in the proceeding, at the discretion of the court.

And section 15 directs that the same jury which shall assess the damages shall also ascertain what property is benefited by the opening of the highway and shall assess one-half of the total amount of damages on the property so benefited.

71 The jury having been sworn first in relation to subdivision 419 of section 1st, it was at once perceived that if the jury were to consider what property outside of that subdivision would be benefited by so much of the new highway as lies within that subdivision and assess it accordingly, another jury, in passing upon an adjacent subdivision, might in return assess benefits anew upon the lots in 419, and thus the assessments of different juries might overlap and be doubled upon the unfortunate lot-holder. The jury were therefore given to understand that they were to confine their assessment for benefits to this subdivision.

On further consideration it does not appear that this would carry out the law.

If we suppose a spacious avenue to be run through a half dozen subdivisions from the boundary of the city to the boundary of the District, it is evident that the part of the avenue nearest the city is just as certainly, though perhaps not in the same degree, beneficial to the most remote as to the nearest subdivision, because it is equally essential to it and forms part of its means of convenient access to the city; and the benefit of such a highway is not confined to the ground immediately abutting on it, but extends laterally to all the property to which it adds a convenient access to the city. In fact it diffuses itself in every direction until it imperceptively disappears like the ripples in a stream caused by a stone thrown into it; but if a jury are to assess all the property so benefited they must first know the whole amount of damages to be awarded for all the property taken for the supposed highway in order that a single assessment for benefits may be made. In order to do this it would be necessary for the same jury to assess the damages in all the subdivisions affected by the highway in question and for all

72 assessments to be suspended until this work is completed, which shows that the assessment for benefits is premature and would in any event have to be set aside.

But, not to speak of the enormous and unreasonable amount of labor that this would devolve upon a single jury, it may be observed that the jury in making such assessment under the present law would be completely at sea, without chart, rudder, or compass.

In some of the States, as appears from cases cited in argument,

assessment or taxation districts are created by the law directing these assessments for benefits, as by directing all the property within a certain distance on each side of the highway to bear the expense of it; but here no boundaries are prescribed to the assessors and they are left to wander indefinitely in search of property which may in their judgment be benefited, in however small a degree.

They are first to ascertain what property will be benefited. Then a gross sum, *i. e.*, one-half of the damages found, is to be charged upon that property, and the jury are to assess upon each lot its "*proper proportional part*" of that sum. By what standard is that proper proportional part to be ascertained? Is the gross sum to be apportioned among the lots according to their street frontage, their area, their existing value, or their probable increased value? It is evident that quite different results might be reached by different modes of apportionment, and yet the law is silent as to which is to govern the jury.

Some very pertinent remarks on this subject were make by the supreme court of New Jersey in the case of State *v.* Hudson County Avenue Commissioners, 37 N. J. L., 12, before referred to.

73 They say: "A legislative act of taxation in order to be legal and effectual must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burden. This is as essential as the designation of the amount to be raised; and not only the sum required must be stated and the property out of which it is to be made designated, but *also some certain standard of assessment must be established.* No act of *taxation can omit any of these components.*"

The uncertainty on this subject of the present law makes it impossible to get at and carry out the intent of the legislative authority, and has the unavoidable result of making any assessment a matter of guess-work or a purely arbitrary distribution of the burden.

The case calls for another remark.

The recording of the map by the Commissioners, if nothing is done in pursuance of this step, is only a less injury to the lot-owners than taking their property without paying for it.

The case of State *v.* Hudson County Avenue Commissioners, before referred to, has some features very like the present case.

The commissioners were authorized by a law to open an avenue across the county of Hudson. Among the first acts required of them was that of surveying the route of this road and adopting a location. This was done and then by a writ of certiorari the proceedings were brought before the Supreme Court.

The law intended to provide that the expense should be apportioned between the owners of land proximate to the road, within certain limits, and the public. The law was so confused and contradictory, however, as to the apportionment of the expense that the court held it impossible to carry it into execution, and

74 the question then was whether the survey and location of the road should still stand good.

And the court said, per Beasley, chief justice: "In this respect, it was said, in the first place, that if the road has been properly laid it should not be obliterated or avoided, on the ground that certain subsequent proceedings prescribed in the statute cannot be carried into effect; but I can find nothing reasonable in such a position. The project cannot be carried through or made in any extent available unless the money necessary for it can be raised. This official survey, brought before us by this writ, is and must remain under the law in its present state a mere dead letter so far as the public is concerned, but it is and must be a very serious incumbrance upon the property which it traverses. As long as this map shall remain upon the public records, threatening the property which it embraces with the realization of the scheme of which it forms a part, so long there is every reason to believe the property will have its value affected in the market. * * * I do not believe the law will permit a landholder to be held at such a disadvantage. This adopted survey constitutes something very like a conditional lien on this land, and that lien cannot, with any sort of justice, be suffered to remain in the illusive anticipation of future legislation."

Accordingly, in that case, the court set aside the entire proceedings of the commissioners, including the recording of the plat of the road.

Had the full effect of the act of 1893 been appreciated before any step was taken to carry it into execution, this case would have been an authority for arresting even the preliminary proceeding of recording the map by certiorari or injunction.

75 No such question, however, is before me, and I refer to it only as an additional feature of the situation showing the importance of some legislative revision of the law.

W. S. COX, *Justice.*

76 *Order Vacating Proceedings.*

Filed Feb. 5, 1896.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for the District of Columbia.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section One of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419.

On hearing and considering the answer of F. B. Abbot to the petition filed herein and the motion of behalf of F. B. Abbot and others to discharge the jury and dismiss this proceeding, after argument by counsel, it appearing to the court that the act of Congress under which this proceeding is instituted is unconstitutional and void for the reasons stated in the opinion of the court this day filed, it is ordered and adjudged by the court this 5th day of Feb-

ruary, A. D. 1896, that the verdict rendered herein by the jury be, and the same is hereby, set aside, and that the petition herein be, and the same is hereby, dismissed.

W. S. COX, *J.*

77 In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for the District of Columbia.

In Re Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section One of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419.

It is hereby stipulated that the entire map or plan of section one (1) as approved in accordance with the requirements of the provisions of the act of Congress under which the proceedings in this cause were instituted and as recorded in the office of the surveyor for said District shall be considered as having been offered in evidence in the cause and duly authenticated, and that the same may be used and referred to in the hearing of this cause on appeal without being printed in the record.

NATH'L WILSON,
Att'y for F. B. Abbot & Others.
SAM'L MADDOX,
Special Att'y for District of Columbia.

78 *Order for Appeal and Citation.*

Filed Feb. 20, 1896.

In the Supreme Court of the District of Columbia.

In Re Denison and Leighton's Subdivision. No. 419, D. C.

The clerk of said court will please enter our appearance as special attorneys for the District of Columbia, and note an appeal to the Court of Appeals of the District of Columbia, and issue citations to all lot-owners who have entered their appearance in above case.

A. S. WORTHINGTON,
SAM'L MADDOX,
Attorney- for Dist. Col.

79 In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for the said District.

In Re Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section 1 of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419.

The President of the United States to Charles H. Armes[1], Mary B. Armes[2], Frank L. Averill[3], F. B. Abbott[4], American Security and Trust Company[5], Robert N. Bayles[6], Susan A. Berry[7], James A. Bates[8], Zeno B. Babbitt[9], Mary A. Cushing[10], Nancy W. Cushing[11], Charles M. Campbell[12], William O. Denison[13], M. W. Dunn[14], Mortimore Du Perow[15], Katherine M. Edmonds[16], Matthew W. Edmonds[17], Benjamin J. Edwards[18], Katherine S. Foos[19], Douglas F. Forrest[20], Emma B. Fitzgerald[21], Mary T. Fitzhugh[22], Albert S. Flint[23], Mark F. Finley[24], Emerella Faris[25], Franklin Investment Company[26], Mrs. Watson Farrar[27], Alfred T. Gage[28], Alexander Grant[29], trustee; John M. Henderson[30], John B. Henderson[31], Theodore A. Harding[32], Thomas W. Hunster[33], Priscilla E. Henley[34], Mary F. Henderson[35], Clarence L. Harding[36], Anna M. Heinz[37], Charles Hampson[38], D. A. Irwin[39], David Ingalls[40], Mary R. Langtree[41], Frederick J. Loudin[42], James C. Matthews[43], Donald McPherson[44], E. French Moran[45], Jas. B. McLaughlin[46], Oliver A. Morris[47], Charles A. Mason[48], James H. Meriwether[49], trustee; Edward Mahon[50], John W. McMahon[51], Columbia R. McMahon[52], Emeline L. Morse[53], John Mitchell, Jr.[54], trustee; Charles F. Nesbit[55], trustee; Stanley Pearce[56], Dorliski E. Parker[57], John Rudden[58], Elbert Robertson[59], John E. Reubsam[60], Charles W. Rowzee[61], William Ramsey[62], George F. Stone[63], Elizabeth Smith[64], G. Warfield Simpson[65], Mary E. Sleman[66], John B. Sleman[67], Oscar P. Schmidt[68], Louis M. Smith[69], Thomas H. Sypherd[70], William F. Snyder[71], Edwin H. Snyder[72], Jennie F. Skinkle[73], Alice E. Snyder[74],

Marie Schmidt,[75] Frederick A. Schmidt,[76] James N. Tyner,[77] Christine Tyner,[78] Sadie Tilley,[79] Huldah Tilley,[80] Wm. W. Townsend,[81] Lydia Tanner,[82] The United States of America,[83] Elizabeth Varney,[84] Isabella Varney,[85] Arthur H. Whitlark,[86] H. O. Williams,[87] Martha H. Wheeler,[88] William Waring, trustee,[89] Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 20th day of February, 1896, wherein The District of Columbia is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

79½ Service of the foregoing citation accepted as follows:

For Benjamin J. Edwards, Ralston & Siddons, attorneys (No. 18).

W. L. Cole, att'y for appellees numbered respectively 1, 2, 9, 21, 27, 30, 38, 41, 50, 51, 52, 56, 57, 60, 61, 62, 63, 64, 66, 67, 70.

F. W. McReynolds, att'y for appellees numbered 16, 17, & 88.

A. A. Birney, att'y for U. S. of America.

Chapin Brown and A. H. O'Connor, att'ys for appellees numbered 68, 75, & 76.

Ernest L. Schmidt, att'y for appellees Nos. 48 & 81.

E. H. Thomas, att'y for appellee No. 46.

S. R. Bond, att'y for appellees Nos. 49 & 89.

William Birney, att'y for appellees Nos. 10, 11, 13, 19, 84, and 85.

J. H. Lichliter, attorney for appellees numbered respectively 32, 33, 47, 59, 71, and 74.

Nath'l Wilson, att'y for appellees 4 & 5.

Wilson & Barksdale, att'y for appellee No. 86.

E. French Moran, appel-ee No. 45.

Donald McPherson, att'y for appellees Nos. 7, 24, & 44.

G. Warfield Simpson, appellee = 65.

F. L. Averill, appellee = 3.

Jas. N. Tyner, appellee No. 77.

Christine Tyner, appellee No. 78.

Louis M. Smith, " " 69.

Mary T. Fitz Hugh, " " 22.

Emerella Faris, appellee " 25.

Charles M. Campbell, appellee No. 12.
J. B. Henderson, " " 31.
Mary F. Henderson, " " 35.
Mortimer Du Perow, " " 15.
Edwin H. Snyder, " " 72.
James A. Bates, " " 8.
Emeline L. Morse, " " 53.
John Rudden, " " 58.
Church & Stephens, att'ys for appellees 26, 54, & 55.
David A. Irwin, appellee No. 39.
Robert N. Bayles, appellee No. 6.
W. B. Matthews, " " 37.
Jennie F. Skinkle, " " 73.
Alfred T. Gage, att'y for appellees No. 28 & 80.
Sadie Tilley, appellee " 79.
Lydia A. Tanner, appellee " 82.
Clarence L. Harding, " " 36.
Alexander Grant, trustee, " 29.
David Ingalls, appellee " 40.
Joseph Forrest, per E. Forrest, appellee No. 20.

[Endorsed:] 419. Dist. ct. doc. Denison & Leighton. The within-named appellees, Anna M. Heintz, Frederick J. Loudin, James C. Matthews, H. O. Williams, M. W. Dunn, and Albert S. Flint, not to be found. Feb'y 26, 1896. Albert A. Wilson, marshal.

80 *Memorandum.*

1896, February 24.—Bond for appeal filed.

81 In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 79, inclusive, to be true copies of originals in cause No. 419, District court, *In Re* Suburban Subdivision known as Denison and Leighton's Subdivision of a Part of Mount Pleasant, &c., as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 26th day of February, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 552. The District of Columbia, appellant, *vs.* Charles H. Armes *et al.* Court of Appeals, District of Columbia. Filed Feb. 26, 1896. Robert Willett, clerk.

Filed May 11, 1896.

UNITED STATES OF AMERICA, *ss:*

[SEAL] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause entitled *In re* suburban subdivision known as Denison and Leighton's subdivision of a part of Mount Pleasant and Pleasant Plains, in the District of Columbia, included within section one of the plan for the extension of a permanent system of highways in the District of Columbia, No. 419, district court, wherein the judgment of the said supreme court entered in said cause on the 5th day of February, A. D. 1896, is in the following words, viz:

"On hearing and considering the answer of F. B. Abbot to the petition filed herein and the motion of behalf of F. B. Abbot and others to discharge the jury and dismiss this proceeding, after argument by counsel, it appearing to the court that the act of Congress under which this proceeding is instituted is unconstitutional and void for the reasons stated in the opinion of the court this day filed, it is ordered and adjudged by the court, this 5th day of February, A. D. 1896, that the verdict rendered herein by the jury be, and the same is hereby, set aside, and that the petition herein be, and
49 the same is hereby, dismissed.

"W. S. COX, *J.*"

as by the inspection of the transcript of the record of the said supreme court which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal taken by the District of Columbia, whereon Charles H. Armes *et al.* were made appellees by a citation issued and served agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas, in the present term of April, in the year of our Lord one thousand eight hundred and ninety-six, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, reversed, each party to pay their own costs in this court; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court, with directions to modify the judgment in so far as it dismisses the petition and to reinstate the cause for further proceedings therein not inconsistent with the opinion of this court.

April 23, 1896.

You therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 11th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

50 *Final Judgment.*

Filed June 1, 1896.

In the Supreme Court of the District of Columbia.

In Re Dennison & Leighton Subdivision of Part of Mount Pleasant and Pleasant Plains. No. 419, District Court.

Pursuant to the mandate of the Court of Appeals of the District of Columbia filed in this court, it is, this 1st day of June, 1896, adjudged, ordered, and decreed that the verdict of the jury filed in this cause, so far as it finds benefits to the remainder of the lot or parcel of ground only a part of which is taken, pursuant to the 11th section of the act of Congress under which this proceeding is had, be, and the same is hereby, vacated, set aside, and for nought held.

It is further adjudged, ordered, and decreed that Schedule 3 of said verdict, which assesses against each of the several parcels of ground therein mentioned its proportional part of the sum of $126,736.27, pursuant to section 15 of said act, be, and the same is hereby, vacated, set aside, and for nought held.

It is further adjudged, ordered, and decreed that the said verdict, so far as it determines the value and awards compensation for the lots and parts of lots of ground taken for a permanent right of way and the buildings thereon, pursuant to the prayers of the petition filed herein, and the damages to lots and parts of lots by reason of the abandonment of a previously existing highway, be, and the same is hereby, ratified and confirmed, except as hereinafter provided, and a permanent right of way over said several lots and parts of lots so taken for the street as indicated on the plat filed with
51 said petition is hereby adjudged to be condemned in accordance with the prayers of the said petition, except as hereinafter provided.

It is further adjudged, ordered, and decreed that there is due and payable the respective owners of the said lots and parts of lots and the buildings thereon condemned as aforesaid as compensation therefor, according to the verdict of said jury, the following sums of money, to wit:

For	lot No.	123, Book 7, p. 133, surv. off. and buildings..	$11,643	50
For	lot No.	124, Book 7, p. 133, surv. off. and buildings..	2,500	00
"	"	125, " " " ..	2,500	00
"	"	126, " " " ..	2,208	50
"	"	127, " " " ..	13,504	00
"	p't "	55.....	2	88
"	" "	56.....	6,369	68
"	"	57.....	5,287	65
"	"	58 and buildings.....	8,034	62
"	p't "	59.....	4,425	05
"	" "	60.....	3,872	05
"	" "	61.....	3,073	85
"	" "	62.....	3,417	37
"	" "	118, B. 7, p. 23, sur. off.....	1,372	72
"	" "	121 and buildings.....	17,775	00
For	lot No.	65 and buildings.....	13,693	60
"	p't "	68.....	2,019	29
"	" "	69.....	1,457	54
"	" "	70.....	895	79
"	" "	71.....	357	90
"	" "	122, B. 8, p. 30, surv. off.....	14,548	88
For	p't lot No.	123, B. 8, p. 30, surv. off.....	3,310	72
52	" "	124, " " "	2,076	75
	" "	125, " " "	1,698	55
For	p't lot No.	126, B. 8, p. 30, surv. off...	1,493	31
"	" "	113.....	4,575	66
"	N. p't "	115.....	1,530	10
"	S. p't "	115.....	1,196	26
"	N. p't "	116.....	1,371	00
"	S. p't "	116.....	426	58
"	p't "	102 and buildings.....	20,701	25
"	" "	103.....	6,209	08
"	" "	104 and buildings.....	8,700	64
"	" "	106.....	799	68
"	" "	107.....	2	08
"	" "	110.....	1,645	00
"	" "	138, B. 8, p. 104, surv. off.....	27	88
"	" "	139, " " "	485	58
"	" "	140, " " "	560	82
"	" "	141, " " "	2,071	95
"	" "	89.....	177	97
"	" "	90.....	85	84
"	" "	72.....	1,152	80
For	p't lot No.	44.....	4,893	59
"	E. " "	47.....	265	87
"	" "	48.....	154	60
"	" "	49.....		68
"	" "	51.....	712	95
"	" "	52.....	1,015	76
"	N. " "	53.....	3,914	04
"	" "	148, B. 9, p. 115, surv. off.....	274	60

	For p't lot No. 149, B. 9, p. 115, surv. off.....	371 50
53	" " " 150, " " "	409 80
	" " " 151, " " "	448 00
	For p't lot No. 152, B. 9, p. 115, surv. off.....	1,074 50
	" " " 54.....	4,122 30
	" " " 122, B. 7, p. 133, surv. off.....	7,052 70
	" " " 125, B. 8, p. 17, surv. off.....	434 10
	" " " 126, B. 8, p. 17, surv. off.....	630 00
	" " " 129, B. 9, p. 124, surv. off.....	353 01
	" " " 130, B. 9, p. 124, surv. off.....	279 62
	" " " 131, B. 9, p. 124, surv. off.....	273 93
	" " " 101.....	3,151 20
	" " " 120, B. 7, p. 23, surv. off.....	1,500 00

And it is further adjudged, ordered, and decreed that there is due and payable to the respective owners of lots and parts of lots as damages for the abandonment of previously existing highways in said subdivision, according to the verdict of said jury as per Schedule No. 2 of said verdict, the following sums of money, to wit:

West part lot 47 and north 10 ft. of lot 148 to 152, inclusive.....	$3,144 69
Lot 50.....	3,201 75
So. p't lot 53.....	608 85
Lot 72.....	600 00

And in respect of the motions for a new trial on the ground that the verdict is unjust and unreasonable as to lots numbered 73 to 83, inclusive, No. 105, 112, 114, 119 (123, 124, 125, 126), 131 to 134, inclusive, as well as in respect of damages to lots 96 and 97, by reason of the abandonment of a previously existing highway, the judgment of the court is reserved.

W. S. COX, *J.*

54 *Memorandum.*

1896, June 19.—Appeals in open court by District of Columbia.
" " " " " B. F. Abbott, one of the respondents.

55 In the Supreme Court of the District of Columbia.

In Re Suburban Subdivision Known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section 1 of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419, District Court.

The President of the United States to The District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pur-

suant to an appeal filed in the supreme court of the District of Columbia on the 19th day of June, 1896, wherein Butler F. Abbot is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 21 day of July, 1896.

S. T. THOMAS,
N.,
Attorney for Appellee.

56 In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for the said District.

In Re Suburban Subdivision Known as Denison and Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section 1 of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. No. 419.

The President of the United States to Charles H. Armes, Mary B. Armes, Frank L. Averill, F. B. Abbott, American Security and Trust Company, Robert N. Bayles, Susan A. Berry, James A. Bates, Zeno B. Babbitt, Mary A. Cushing, Nancy W. Cushing, Charles M. Campbell, William O. Denison, M. W. Dunn, Mortimore Du Perow, Katherine M. Edmonds, Matthew W. Edmonds, Benjamin J. Edwards, Katherine S. Foos, Douglas F. Forrest, Emma B. Fitzgerald, Mary T. Fitzhugh, Albert S Flint, Mark F. Finley, Emerella Faris, Franklin Investment Company, Mrs. Watson Farrar, Alfred T. Gage, Alexander Grant, trustee: John M. Henderson, John B. Henderson, Theodore A. Harding, Thomas W. Hunster, Priscilla E. Henley, Mary F. Henderson, Clarence L. Harding, Anna M. Heinz, Charles Hampson, D. A. Irwin, David Ingalls, Mary R. Langtree, Frederick J. Loudin, James C. Matthews, Donald McPherson, E. French Moran, Jas. B. McLaughlin, Oliver A. Morris, Charles A. Mason, James H. Meriwether, trustee; Edward Mahon, John W. McMahon, Columbia R. McMahon, Emeline L. Morse, John Mitchell, Jr., trustee; Charles F. Nesbit, trustee; Stanley Pearce, Dorliski E. Parker, John Rudden, Elbert Robertson, John E. Reubsam, Charles W. Rowzee, William Ramsey, George F. Stone, Elizabeth Smith, G. Warfield Simpson, Mary E. Sleman, John B. Sleman, Oscar P. Schmidt, Louis M. Smith, Thomas H. Sypherd, William F. Snyder, Edwin H. Snyder, Jennie F. Skinkle, Alice E. Snyder, Marie Schmidt,

Frederick A. Schmidt, James N. Tyner, Christine Tyner, Sadie Tilley, Huldah Tilley, Wm. W. Townsend, Lydia Tanner, The United States of America, Elizabeth Varney, Isabella Varney, Arthur H. Whitlark, H. O. Williams, Martha H. Wheeler, William Waring, trustee, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 19th day of June, 1896, wherein The District of Columbia is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

57 Service of the foregoing citation accepted as follows:

G. WARFIELD SIMPSON,
1118 *F St. N. W.*

[Endorsed:] District court. No. 419. *In re* suburban subdivision known as Denison and Leighton's subdivision of part of Mt. Pleasant, &c. Citation. Issued June 19, 1896. Service of citation waived for all the parties for whom I appear. W. L. Cole. We, the undersigned, waive citation and services thereof for all parties for whom we appear. Chapin Brown, Arthur H. O'Connor, S. R. Bond, F. W. McReynolds, Wm. Birney. S. T. Thomas, att'y.

[Endorsed:] We, the undersigned, waive citation and service thereof for all parties for whom we appear. Church & Stephens; A. A. Birney, for U. S.; Joseph Forrest, per E. Forrest, att'y for Douglas F. Forrest; E. H. Thomas, for McLaughlin; Nath'l Wilson, for Ernest L. Schmidt; Wilson & Barksdale, att'ys for Arthur H. Whitlark; W. L. Cole, for same parties represented by me in former appeal.

58 *Order Granting New Trial, &c.*

Filed June 24, 1896.

In the Supreme Court of the District of Columbia, Holding a District Court.

In Re Suburban Subdivision Known as Denison and Leighton's Subdivision of Part of Mt. Pleasant, etc. No. 419.

The court having heretofore reserved its decision of the several motions for new trial as to the hereinafter-mentioned lots and build-

ings mentioned in this proceeding, and having further considered said motions, and the court being of opinion, upon the record and testimony in the case, that the compensation and damages awarded by the verdict of the jury heretofore filed herein are unreasonable, so far as the lots hereinafter mentioned are concerned—that is to say, lots No. 131, 132, 133, 134 and lots No. 112 and 114 and lots No. 123, 124, 125, and 126, B. 8, p. 72, surv. off., and lots No. 73 to 83, inclusive, as the same are represented on the plat filed with the petition herein—and the court being further of opinion, from the said record and testimony, that the damages awarded for injury to buildings on lot No. 105 are inadequate, and that the failure of said jury to make any award of damages for the injuries to buildings on lots Nos. 119 and 120 was an obvious mistake, it is this 24th day of June, A. D. 1896, adjudged and ordered that the said motions for new trial be granted, and that said verdict in respect of said lots and buildings be, and the same is hereby, set aside and annulled, and that a new trial be awarded in respect of said several lots and said buildings.

W. S. COX, *J.*

58½ *Order Amending Final Judgment of June* 1, 1896.

Filed June 27, 1896.

In the Supreme Court of the District of Columbia.

In Re Denison and Leighton's Sub. of Mt. Pleasant, &c. No. 419, District Court.

It appearing from an inspection of the judgment, order, and decree entered in this cause on the 1st day of June, 1896, that by a clerical error the verdict of the jury as to lots numbered 123, 124, 125, and 126, B. 8, p. 72, surv. off., was confirmed, whereas in truth and in fact the judgment of the court respecting said lots was reserved, it is this 27th day of June, 1896, ordered that said order, judgment, and decree be amended as to said lots, and that they be omitted from the same.

W. S. COX, *J.*

Memorandum.

1896, July 11.—Bond by appellant, respondent B. F. Abbott, filed and approved.

59 *Stipulation as to Printed Record on Former Appeal.*

Filed September 17, 1896.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In Re Suburban Subdivision Known as Denison & Leighton's Subdivision of a Part of Mount Pleasant and Pleasant Plains, in the District of Columbia, Included within Section 1 of the Plan for the Extension of a Permanent System of Highways in the District of Columbia. District Court, 419.

It is hereby stipulated and agreed that the record heretofore printed in this case and filed in the Court of Appeals of the District of Columbia, a print of which is hereto attached, shall be taken, considered, and used as a part of the record in the case of the appeal taken from the final judgment and decree passed herein on the 1st day of June, 1896.

S. T. THOMAS,
For District of Columbia.
NATH'L WILSON,
For Appellant, B. F. Abbot.

60 & 61 In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing printed copy of record, containing 47 pages, and the typewritten pages, numbered from 1 to 11, inclusive, to be true copies of originals on file and of record in said court, in cause entitled "*In re* suburban subdivision known as Dennison and Leighton's subdivision of a part of Mt. Pleasant and Pleasant Plains, in the District of Columbia, included within section 1 of the plan for the extension of a permanent system of highways in the District of Columbia, No. 419, District court."

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 17th day of September, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

[Endorsed:] District of Columbia supreme court. No. 624: Butler F. Abbot, appellant, *vs.* John W. Ross *et al.*, Comm'rs of the District of Columbia, and No. 625: John W. Ross *et al.*, Comm'rs of the District of Columbia, appellants, *vs.* Charles H. Armes *et al.* Court of Appeals, District of Columbia. Filed Sep. 23, 1896. Robert Willett, clerk.

62 MONDAY, *October 5th, A. D.* 1896.

BUTLER F. ABBOT, Appellant,
vs.
JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. POWELL, Commissioners of the District of Columbia, } No. 624.

and

JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. Powell, Commissioners of the District of Columbia, Appellants,
and
CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOTT, *et al.* } No. 625.

Upon motion of Mr. Nathaniel Wilson, of counsel, it is ordered by the court that the printing of the record in the above-entitled causes be dispensed with, as per agreement of counsel; whereupon these causes were submitted to the consideration of the court on the transcript of record herein.

63 Court of Appeals of the District of Columbia, October Term, 1896.

BUTLER F. ABBOT, Appellant,
vs.
JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. POWELL, Commissioners of the District of Columbia, } No. 624.

and

JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. Powell, Commissioners of the District of Columbia, Appellants,
vs.
CHARLES H. ARMES *et al.* } No. 625.

Opinion.

It appears from the record in these cases that the decree appealed from was entered in the court below in pursuance of the mandate issued by this court on the 11th day of May, 1896, in case No. 552 on the docket of this court and in pursuance of the opinion of this court in that case, and that the questions of law involved in this appeal are the same as those then considered and passed upon by this court.

The decree now appealed from, which is the decree of the supreme court of the District of Columbia, holding a district court of the United States for the District of Columbia, entered June 1, 1896, must therefore, for the reasons fully stated in the opinion of this court above referred to, be affirmed with costs, and it is so ordered.

By the court:

R. H. ALVEY, *Ch. Justice.*

64 October Term, 1896.

BUTLER F. ABBOT, Appellant,
vs.
JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. POWELL, Commissioners of the District of Columbia. } No. 624.

and

JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. POWELL, Commissioners of the District of Columbia, Appellants,
vs.
CHARLES H. ARMES *et al.* } No. 625.

Appeals from the supreme court of the District of Columbia, holding a district court of the United States for said District.

Decree.

The appeal and the cross-appeal in the above-entitled cases came on to be heard on the transcript of record from the supreme court of the District of Columbia, holding a district court of the United States for said District; on consideration whereof it is now here ordered and adjudged by this court that the decree of the said supreme court of the District of Columbia, sitting as a district court of the United States for said District in the above-entitled causes, be, and the same is hereby, affirmed with costs.

October 5, 1896.

Per MR. CHIEF JUSTICE ALVEY.

65 BUTLER F. ABBOT, Appellant,
vs.
JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. POWELL, Commissioners of the District of Columbia. } No. 624.

On motion of Mr. Nathaniel Wilson, of counsel for the appellant in the above-entitled cause, it is ordered by the court that Butler F. Abbot, appellant, be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of two hundred and fifty dollars.

66 Know all men by these presents that we, Butler F. Abbot, as principal, and David A. Chambers, as surety, are held and firmly bound unto John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, in the full and just sum of two hundred and fifty dollars, to be paid to the said John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Butler F. Abbot and others against The Commissioners of the District of Columbia, a decree was rendered against the said Butler F. Abbot, and the said Butler F. Abbot having been allowed an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Butler F. Abbot shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

B. F. ABBOT, [SEAL.]
By his att'y-in-fact, NATH'L WILSON. [SEAL.]
DAVID A. CHAMBERS. [SEAL.]

Sealed and delivered in the presence of—
JOHN E. HOOVER.

Bond satisfactory.
S. T. THOMAS, *Att'y D. C.*

Approved by—
R. H. ALVEY,
Chief Justice.

[Endorsed:] No. 624. Butler F. Abbot *vs.* John W. Ross *et al.*, Comm'rs D. C. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Oct. 9, 1896. Robert Willett, clerk.

67 UNITED STATES OF AMERICA, *ss:*

To John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Butler F. Abbot is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 9th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged October 9th, 1896.

S. T. THOMAS, *Att'y D. C.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 9, 1896. Robert Willett, clerk.

68 JOHN W. ROSS, GEORGE TRUESDELL, and CHARLES F. POWELL, Commissioners of the District of Columbia, Appellants,
vs.
CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOT, *et al.* } No. 625.

On motion of Mr. S. T. Thomas, of counsel for the appellants in the above-entitled cause, it is ordered by the court that John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, appellants, be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of two hundred and fifty dollars.

69 Know all men by these presents that we, John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, as principals, and The Fidelity and Deposit Company of Maryland, a corporation of Baltimore city, Maryland, as surety, are held and firmly bound unto Charles H. Armes, Mary B. Armes, Frank L. Averill, F. B. Abbott, American Security and Trust Company, Robert N. Bayles, Susan A. Berry, James A. Bates, Zeno B. Babbitt, Mary A. Cushing, Nancy W. Cushing, Charles M. Campbell, William O. Denison, M. W. Dunn, Mortimore Du Perow, Katharine M. Edmonds, Matthew W. Edmonds, Benjamin J. Edwards, Katherine S. Foos, Douglas F. Forrest, Emma B. Fitzgerald, Mary T. Fitzhugh, Albert S. Flint, Mark F. Finley, Emerella Faris, Franklin Investment Company, Mrs. Watson Farrar, Alfred T. Gage, Alexander Grant, trustee; John M. Henderson, John B. Henderson, Theodore A. Harding, Thomas W. Hunster, Priscilla E. Henley, Mary F. Henderson, Clarence L. Harding, Anna M. Heinz, Charles Hampson, D. A. Irwin, David Ingalls, Mary R. Langtree, Frederick J. Loudin, James C. Matthews, Donald McPherson, E. French Moran, Jas. B. McLaughlin, Oliver A. Morris, Charles A. Mason, James H. Meriwether, trustee; Edward Mahon, John W. McMahon, Columbia R. McMahon, Emeline L. Morse, John Mitchell, Jr., trustee; Charles F. Nesbit, trustee; Stanley Pearce, Dorliski E. Parker, John Rudden, Elbert Robertson, John E. Reubsam, Charles W. Rowzee, William Ramsey, George F. Stone, Elizabeth Smith, G. Warfield Simpson, Mary E. Sleman, John B. Sleman, Oscar P. Schmidt, Louis M. Smith, Thomas H. Sypherd, William F. Snyder, Edwin H. Snyder, Jennie F. Skinkle, Alice E. Snyder, Marie Schmidt, Frederick A. Schmidt, James N. Tyner, Christine Tyner, Sadie Tilley, Huldah Tilley, Wm. W. Townsend, Lydia Tanner, The United States of America, Elizabeth Varney, Isabella Varney, Arthur H. Whitlark, H. O. Williams, Martha H. Wheeler, William Waring, trustee, in

the full and just sum of two hundred and fifty ($250.00) dollars, to be paid to the said obligees, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, and said obligees, a judgment was rendered against the said John W. Ross, George Truesdell, and Charles F. Powell, Commissioners, etc., and the said John W. Ross, George Truesdell, and Charles F. Powell, Commissioners, etc., having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said obligees and each of them, and citing and admonishing them and each of them to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said John W. Ross, George Truesdell, and Charles F. Powell shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN W. ROSS. [SEAL.]
GEO. TRUESDELL. [SEAL.]
CHAS. F. POWELL. [SEAL.]
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By WILLIAM A. GORDON, [SEAL.]
Of Local Board.

[Seal of Fidelity & Deposit Company of Maryland.]

Sealed and delivered in the presence of—

WILLIAM TINDALL,
As to Comm'rs D. C.

Attest: J. SPRIGG POOLE, *Ag't.*

Approved by—

R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 625. John W. Ross *et al.*, Comm'rs D. C., *vs.* Charles H. Armes *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Oct. 6, 1896. Robert Willett, clerk.

70 UNITED STATES OF AMERICA, *ss:*

To Charles H. Armes, Mary B. Armes, Frank L. Averill, F. B. Abbott, American Security and Trust Company, Robert N. Bayles, Susan A. Berry, James A. Bates, Zeno B. Babbitt, Mary A. Cushing, Nancy W. Cushing, Charles M. Campbell, William O. Denison, M. W. Dunn, Mortimore Du Perow, Katharine M. Edmonds, Matthew W. Edmonds, Benjamin J. Edwards, Katherine S. Foos, Douglas F. Forrest, Emma B. Fitzgerald, Mary T. Fitzhugh, Albert S. Flint, Mark F. Finley, Emerella Faris, Franklin Investment Company, Mrs. Watson Farrar, Alfred T. Gage, Alexander Grant, trustee; John M. Henderson, John B. Henderson, Theodore A. Harding, Thomas W. Hunster, Priscilla E. Henley, Mary F. Henderson, Clarence L. Harding, Anna M. Heinz, Charles Hampson, D. A. Irwin, David Ingalls, Mary R. Langtree, Frederick J. Loudin, James C. Matthews, Donald McPherson, E. French Moran, Jas. B. McLaughlin, Oliver A. Morris, Charles A. Mason, James H. Meriwether, trustee; Edward Mahon, John W. McMahon, Columbia R. McMahon, Emeline L. Morse, John Mitchell, Jr., trustee; Charles F. Nesbit, trustee; Stanley Pearce, Dorliski E. Parker, John Rudden, Elbert Robertson, John E. Reubsam, Charles W. Rowzee, William Ramsey, George F. Stone, Elizabeth Smith, G. Warfield Simpson, Mary E. Sleman, John B. Sleman, Oscar P. Schmidt, Louis M. Smith, Thomas H. Sypherd, William F. Snyder, Edwin H. Snyder, Jennie F. Skinkle, Alice E. Snyder, Marie Schmidt, Frederick A. Schmidt, James N. Tyner, Christine Tyner, Sadie Tilley, Huldah Tilley, Wm. W. Townsend, Lydia Tanner, The United States of America, Elizabeth Varney, Isabella Varney, Arthur H. Whitlark, H. O. Williams, Martha H. Wheeler, William Waring, trustee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] Service of citation waived for all the parties for whom we appear. Oct. 6, '96. E. H. Thomas, Chapin Brown, Arthur H. O'Connor, S. R. Bond, Joseph Forrest, per E. F.; A. A. Birney, for U. S.; William Birney, W. L. Cole, Andrew Wilson,

Noel W. Barksdale, Ernest L. Schmidt, Nath'l Wilson, Church & Stephens, C. H. Armes. Court of Appeals, District of Columbia. Filed Oct. 7, 1896. Robert Willett, clerk.

71 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the cases of Butler F. Abbot, appellant, *vs.* John W. Ross, *et al.*, Commissioners of the District of Columbia, and John W. Ross *et al.*, Commissioners of the District of Columbia, appellants, *vs.* Charles H. Armes *et al.*, Nos. 624 & 625, October term, 1896, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of October, A. D. 1896.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 631.

CHARLES H. BAUMAN ET AL., APPELLANTS,

vs.

JOHN W. ROSS ET AL.

No. 632.

JOHN W. ROSS ET AL., APPELLANTS,

vs.

CHARLES H. BAUMAN ET AL.

No. 633.

BUTLER F. ABBOT, APPELLANT,

vs.

JOHN W. ROSS ET AL.

No. 634.

JOHN W. ROSS ET AL., APPELLANT,

vs.

CHARLES H. ARMES ET AL.

Brief for John W. Ross, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia.

A. S. WORTHINGTON,
of Counsel for the Commissioners of the District of Columbia.

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IN THE

Supreme Court of the United States.

October Term, 1896.

No. 631.

CHARLES H. BAUMAN, JOHN H. JOLLY, CHARLES G. SHOEMAKER, ANNIE H. PANGHORN, EDMUND N. WOODRUFF, HERBERT H. KIMBALL, JAMES H. HENSLEY, AND FRANK B. NOYES, APPELLANTS,

vs.

JOHN W. ROSS, GEORGE TRUESDELL, AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No. 632.

JOHN W. ROSS, GEORGE TRUSDELL, AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELANTS,

vs.

CHARLES H. BAUMAN, JOHN H. JOLLY, CHARLES G. SHOEMAKER, ANNIE H. PANGHORN, EDMUND N. WOODRUFF, HERBERT H. KIMBALL, JAMES H. HENSLEY, AND FRANK B. NOYES.

No. 633.

BUTLER F. ABBOT, APPELLANT,

vs.

JOHN W. ROSS, ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No. 634.

JOHN W. ROSS, ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOT, ET AL.

Appeals from the Court of Appeals of the District of Columbia.

Brief for the Commissioners of the District of Columbia, Appellees, in Cases No. 631 and 633 and Appellants in Cases No. 632 and 634.

STATEMENT OF THE CASE.

These cases arise under an act of Congress, approved March 2, 1893, entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities" (27 Stat., 532). For the convenience of the court this statute has been printed in full as an appendix to this brief, together with an amendatory act giving an appeal to this court. To a proper understanding of these cases it is necessary to set forth somewhat in detail the evils which led to the enactment of this statute and the proceedings in the cases in the Supreme Court of the District of Columbia and in the Court of Appeals.

The plan of the city of Washington, as laid out by President Washington, extended on the north only to the highway which on that plan was named Boundary street. That street extended from a point where now exists the bridge over Rock Creek at P street to a point at the eastern end of Maryland avenue, a distance of over four miles. No provision was made for the extension of the plan of the city over the remainder of the District or any part thereof until the act of 1888, which is referred to below. For many years prior to the date of the act of 1888, the opening of highways in that part of the District of Columbia outside of the cities of Washington and Georgetown was governed by an act of March 3, 1863 (12 Stat., 801). The substance of that act was incorporated in sections 252 to 265, both inclusive, of the Revised Statutes of the United States relating to the District of Columbia.

By an act approved January 12, 1809 (2 Stat., 511), it was provided in substance that whenever the proprietor of any square or lot in Washington should deem it necessary to subdivide the same, he might cause a plat to be made and submit it to the surveyor of the District. If the surveyor found the dimensions of the land as subdivided to correspond

with the original lots, he was required to so certify and to record the plat in a book in his office kept for that purpose (see Sections 477, 478, Rev. Stat. D. C.) The first legislative assembly of the District of Columbia by an act approved by the governor of the District of Columbia on August 23, 1871, entitled "An act prescribing the duties of certain officers for the District of Columbia and fixing their compensation" provided, among other things, "that whenever the proprietor of any tract or parcel of land in the District of Columbia shall desire or deem it necessary to subdivide, such subdivision shall be by the surveyor of the District of Columbia, or his assistant only, and shall be entered in the plat book or books of said surveyor." (Laws of the Dist. of Col. 1871, 1872, 152.)

By its terms, the operation of the above-mentioned act of 1809 was confined to subdivisions of land in the city of Washington, but, without any express authority of law, owners of land in the District outside of Washington prepared and had recorded in the surveyor's books subdivisions thereof. That part of the act of the legislative assembly of 1871, above referred to, seems to have been intended to give express authority for what before had been done by sufferance. But, however that may be, soon after the war these subdivisions in the county of Washington began to make their appearance in the surveyor's books, and up to the time of the passage of the act of 1888, a great many such subdivisions in the county had been recorded. Each land owner made a subdivision to suit himself. They were laid out in all parts of the District, extending even to the Maryland line. Many of the streets in the subdivisions were narrower than the corresponding city streets. Some of the streets running north and south were laid down as extensions of the existing streets; some were not; and in hardly any case were the diagonal avenues prolonged. Cross streets were laid out at various angles. Adjoining subdivisions differed from each other, so that a street upon one would have no extension upon its neighbor. There was no harmony or regularity among the different subdivisions in respect of the width or direction of the streets. As

the number of subdivisions grew, the difficulties arising from this want of a general plan increased. The proprietor of a tract of land who wished to subdivide it would find himself surrounded by existing subdivisions each different from the others, so that if he laid out his streets to connect with one they would not harmonize with any of the others.

This was the situation when Congress passed an act approved August 27, 1888, entitled "An act to regulate the subdivision of land within the District of Columbia" (25 Stat., 451). The first section of that act directed the Commissioners of the District to make and publish general orders regulating the platting and subdividing of all lands and grounds in the District of Columbia, and provided that no subdivision should be recorded in the surveyor's office until approved by the Commissioners. The fifth section of the act is in these words:

"No future subdivision of land in the District of Columbia without the limits of the cities of Washington and Georgetown shall be recorded in the surveyor's office of the said District, *unless made in conformity with the general plan of the city of Washington.*"

Between 1888 and 1893 some fifty subdivisions of land in the county of Washington were recorded in the office of the surveyor. In carrying out the act of 1888 grave difficulties were experienced, resulting principally from the fact that the authorities were not empowered to make any changes whatever in subdivisions that had been recorded before the act was passed. The result was that in some instances the streets of subdivisions laid out under that act which conformed to the city streets did not join or connect with the streets of the old subdivisions. In some instances a subdivision approved by the Commissioners under the act of 1888, upon which the streets of the city were prolonged, would be separated from the city by an old subdivision not conforming to the plan of the city. In such cases the land owner would find himself with streets which ran in the right direction and

were of the proper width, but which were of little use to him for the reason that there was no connection between them and the city streets. Another difficulty was that subdivisions made in different parts of the District at different times, approved often by different officers, would not harmonize with one another. In deciding where a certain avenue, for instance, should run, it was essential in laying it out in a distant part of the District to first determine its course over the land lying between such tract and the Boundary. And to conform to the plan of the city within the meaning of the act of Congress it was necessary that new avenues should be laid out which were not prolongations of any of the avenues of the city. To determine where these avenues should run, and to locate circles and other reservations, corresponding to those in the city proper, necessarily required a general plan. For these and other reasons it became evident that while the act of 1888 was a great improvement on the state of things which existed before its passage, it had defects which required further legislation, and it was seen at once that the only efficient remedy was the preparation of one general plan which should embrace the entire District outside of Washington and Georgetown.

To do this was the object of the act of 1893, the constitutionality of which is involved in this hearing. The first five sections of that act simply provide that there shall be prepared and recorded, in sections, from time to time, a map extending the plan of the city of Washington over the District, and direct that after the map shall be filed no subdivision not in conformity to it shall be recorded either in the office of the surveyor of the District or in the office of the Recorder of Deeds.

In preparing the map the Commissioners were directed to conform to existing subdivisions made in compliance with the act of 1888. As to the old subdivisions, no restrictions were thrown about the Commissioners. They are authorized by the second section to adopt any of these old subdivisions which shall in their opinion conform to the general plan of

the city of Washington, and the same section further provides that in making the plan there shall be kept in view "the necessity of harmonizing as far as possible the public convenience with economy of expenditure." In 1895 the Commissioners were authorized to make minor essential changes in subdivisions made under the act of 1888 (28 Stat., 748). Under the act of 1893, there was prepared a map known as Map of Section One, which embraced all the territory in the District lying north of Boundary street, or Florida avenue, from Rock Creek on the west, to North Capitol street extended on the east. When this map was about to be filed in the office of the surveyor of the District for record, the owners of certain land embraced by the map filed a bill in the Supreme Court of the District of Columbia against the Commissioners of the District seeking to have them enjoined from recording the map on the ground that the filing of it in the surveyor's office would amount to a taking of their property for public use without compensation. In that bill a preliminary injunction was asked for. This application was argued before Mr. Justice McComas, who was then holding a special term of the Supreme Court of the District sitting as an Equity Court. He refused to grant the preliminary injunction; the map was recorded; and no further action was taken in that case.

Within the limits of the map in question there were forty-seven subdivisions then existing, which were more or less changed by the plan laid down on the map. By section six of the act the Commissioners were required within thirty days after the filing of the map to make application to the Supreme Court of the District, holding a special term as a District Court of the United States, for the condemnation of a permanent right of way for the public over all the land (not already owned by the United States or the District of Columbia, or dedicated to the public use as a highway) lying within the limits of each of these forty-seven subdivisions. The Commissioners complied with this provision of the law on the 27th day of September, 1895, by filing in the proper court a separate petition as to each of the forty-seven subdivisions in

question. Due notice by personal service and publication, as required by section eight of the act, was given to the parties in interest. By section ten of the act it thereupon became the duty of the court to proceed to ascertain the damages through the instrumentality of a "jury" of seven.

All the owners of land in the subdivisions known as "Ingleside" and "Denison and Leighton's subdivision of a part of Mt Pleasant and Pleasant Plains" appeared in person or by counsel. The Denison and Leighton case was first tried, and the Ingleside case was then taken up. The Ingleside case appears in this court as Charles H. Bauman et al., appellants, *vs.* John W. Ross et al., No. 631; and John W. Ross et al., appellants, *vs.* Charles H. Bauman et al. (cross-appeal), No. 632. The Denison and Leighton case appears in this court as Butler F. Abbot, appellant, *vs.* John W. Ross et al., No. 633; and John W. Ross et al., appellants, *vs.* Charles H. Armes et al. (cross-appeal), No. 634. The appeals and cross-appeals in both cases, by direction of the court, are heard here together as one case.

In the proceedings in these cases in the special term of the Supreme Court of the District, Mr. Justice Cox presided. At the conclusion of the case involving the Denison and Leighton subdivision, upon the motion of B. F. Abbot, the owner of one lot in that subdivision, Mr. Justice Cox, on the 5th day of February, 1896, set aside the verdict which the jury had rendered and dismissed the petition under which the proceedings were had, on the ground that the act of Congress, under which the proceeding was instituted, is unconstitutional and void, for the reasons stated in the opinion of the court filed the same day (Rec. in Nos. 633 and 634, pp. 7, 43). The opinion referred to in this order is printed on pages 32 to 43 of the same record.

The ground upon which Mr. Justice Cox held the act in question unconstitutional was that section 11 of the act provides that where the use of a part only of a tract of land is condemned, the jury in assessing damages therefor "shall take into consideration the benefit the purpose for which it

is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same and shall give their verdict accordingly." Mr. Justice Cox held that the proper construction of this section requires the jury to take into consideration the benefits which may result from the subsequent opening and improvement of the street, and that so construed the section is void; and he further held that because this section was unconstitutional the whole act was void. While deciding nothing further than this, the learned justice took occasion to suggest that section 15 of the act, which provides for assessing one-half of the damages upon the land benefited could not be enforced, because the law did not fix either the taxing district or the rule of apportionment, but left those matters to be determined by the jury under the direction of the court. He also intimated that the sections of the law, which provide merely for the preparation and recording of the maps, were objectionable as being "only a less injury to the lot owners than taking their property without paying for it."

From the order dismissing the petition in the Denison and Leighton case, the Commissioners of the District appealed to the Court of Appeals. That court reversed the order dismissing the petition and remanded the case to the Supreme Court of the District for further proceedings in conformity to the opinion of the Court of Appeals. Two opinions were filed in the case in the Court of Appeals—one—the majority opinion—delivered by Mr. Justice Shepard, and a dissenting opinion by Mr. Chief Justice Alvey. The majority opinion will be found in the record in cases Nos. 631 and 632, page 40, and the dissenting opinion of the Chief Justice at page 49. In the majority opinion, section 11 of the act is held to be unconstitutional, but not for the reason given by the court below. Mr. Justice Cox held that it is competent for Congress, where a part of a tract is taken for a highway, to deduct from the value of the part taken, the benefit to the remainder of the tract, provided the highway is to be at once opened and improved. But the majority of the Court of Appeals held that such a deduction may not be made in any case, no matter how clear

and immediate the benefit may be. In his dissenting opinion the Chief Justice differed from both the majority opinion of the Court of Appeals and from Mr. Justice Cox, and held section 11 to be constitutional. All the judges of the Court of Appeals, however, agreed with Mr. Justice Cox that section 15 is void, substantially upon the grounds stated by the latter. But the justices of the Court of Appeals unanimously held further that the invalidity of sections 11 and 15 did not affect the rest of the act.

The result of this was to hold the proceedings valid so far as the filing of the map and the ascertainment of the value of the land actually taken and the amount of other damages were concerned, and to hold them invalid so far as concerned both the deduction and the assessment of benefits. Accordingly, when the case was remanded to the court below judgment was entered in favor of each of the land owners (except a few who obtained new trials) for his damages, as ascertained by the jury. (See final judgment, p. 50 Rec. in 633, 634).

There were about seventy-five lots, parts only of which were taken, in Dennison and Leighton's subdivision. There were some twenty other lots which were affected by the abandonment of existing streets. As to all these lots (except the few who obtained new trials on the ground that the amounts allowed were insufficient) the owners were satisfied with the result, except the owner of lot 61. In his case judgment was entered in his favor for $3,073.85—the value as ascertained by the jury of the part of lot 61 which was condemned disregarding the benefits deducted—$536.40—and the additional assessment of $1,012.90. (Record in 633 and 634, pages 13, 15). He appealed to the Court of Appeals and the Commissioners thereupon took a cross-appeal. In the Court of Appeals the court affirmed the judgment which had been entered in pursuance of its mandate, whereupon both parties appealed to this court.

In the other case, involving the Ingleside subdivision, the Supreme Court of the District of Columbia in special term followed the rule which had been laid down by the Court of

Appeals in the Dennison and Leighton case, and gave judgment in favor of the several land owners for the value of their land actually taken, as ascertained by the jury, without deduction or assessment on account of benefits (Rec. in 631 and 632, p. 26). In that case all the parties appealed to the Court of Appeals, where the judgment was affirmed. The opinion of the court in this case was delivered by Chief Justice Alvey, who says that in the other case—that involving the Denison and Leighton subdivision—"this court had occasion to consider the questions of law which are now here raised by the appeal and cross-appeal from the decree of the court below set forth in the record. On the authority of that case the decree herein of the Supreme Court of the District of Columbia holding a District Court of the United States for said District, must be affirmed with costs" (Rec. in 631 and 632, p. 60). From the final judgment in the Court of Appeals, all the parties to the proceeding appealed to this court and duly perfected their appeal.

ASSIGNMENTS OF ERROR.

The court below erred.

1. In holding that Section 11 of the act of March 2, 1893, or any part thereof, is unconstitutional and void.

2. In holding that Congress has not the power in establishing highways in the District of Columbia to provide that where only a part of a tract is taken for the highway the compensation to which the owner is entitled therefor, may not be made in part by benefits which accrue to him through the enhanced value of the remainder of the tract from the establishing of the highway.

3. In holding that Section 15 of the act of March 2, 1893, is void.

4. In holding that it is not competent for Congress in making assessments to pay in whole or in part for public improvements in the District of Columbia, to leave with the

officers who are charged with the duty of making the assessment the fixing of the taxing district and the establishment of the proper rule of apportionment among the parcels benefited.

ARGUMENT.

I.

Section 11 *of the act of March* 2, 1893, *is not unconstitutional.*

That section is in the following words:

"That where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury in assessing the damages therefor shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately."

By Art. 5 of the amendments to the Constitution, it is provided: "Nor shall private property be taken for public use without just compensation."

In considering the application of this constitutional provision to Section eleven two questions arise:

First. May the special benefits to the part of a tract not taken be deducted from the value of the part taken in any case, and

Second. If such benefits may be deducted within certain limits, does the section in question require deduction beyond those limits?

These two questions we will consider separately.

First. Just compensation may be made in whole or in part for part of a tract of land taken for public use by the deduction of special benefits to the remainder of the tract.

In the courts below, upon this question, the four justices who heard the cases were equally divided. Mr. Justice Cox

held that such deductions may be made. He concluded what he said upon this subject in the following words:

"It would be utterly useless to attempt a review of the authorities, and I do not see how I can do better than acquiesce in the conclusion of those eminent commentators—Judge Cooley and Judge Dillon—that the weight of authority in the state courts favors the last-mentioned view, viz, that the special benefits to an individual lot, of which a part is condemned, can properly be set off against or deducted from the amount found due as the value of the land appropriated and as special damage to the remainder of the tract or parcel" (Rec. in 631–2, p. 31).

Mr. Justice Shepard in delivering the opinion of the majority of the court in the Court of Appeals, took the opposite view of this question, holding that "just compensation means the actual value of the property taken, payable in money and without diminution on account of benefits, general or special" (Rec. in 631–2, p. 43). In his dissenting opinion Chief Justice Alvey agreed with Mr. Justice Cox on this subject. He said: "It would seem to be clear that it is competent to Congress in legislating for this District to require the benefits, if benefits there really be, to the remaining parcel of land, where a part only of a tract is taken, to be taken into consideration in estimating the just compensation for the part taken for the improvement as provided in section 11 of the Act of 1893" (Rec. in 631–2, p. 54).

We proceed to refer to the authorities on this much mooted question, referring first to cases in the local courts of the District, next to those in this court, then to the principal text writers on the subject to cases in the State courts.

(*a*). Acts of Congress relating to deductions for benefits in the District of Columbia, and decisions of the local courts thereon.

When Congress took charge of the territory known as the District of Columbia, and organized a local government therein, it gave charge of matters in that part of the District of Columbia known as the county of Washington to what was called the "levy court." By an act approved July 1, 1812,

(2 Stat., 771) Congress authorized the levy court to "lay out, straighten and repair public roads" in the county of Washington, and prescribed the proceedings to be followed when land was to be condemned for such a road. The statute authorized any justice of the peace, on application of the authorities, to summon a jury of twelve freeholders, and the members of the jury were required to take an oath to "value the land and all damages the owner thereof will sustain by the road passing through the same, *having regard to all circumstances of convenience, benefit or disadvantage.*"

By section 5 of an act approved May 3, 1862 (12 Stat., 383, 384), the levy court was required, in laying out future roads, to make them of a width of not less than fifty nor more than one hundred feet, and it was authorized to increase the width of existing roads to not more than one hundred feet, and to change the location of them, and for the purpose of opening or widening such roads the act in question further provided, "The said levy court is hereby empowered to cause to be condemned any land or lands necessary for the same, as other lands are now condemned by law."

By an act approved March 3, 1863, the laws then in existence relating to the levy court were consolidated and amended. By section 8 of that act (12 Stat., 801) the existing powers of the levy court in the matter of opening new roads in the county of Washington, or changing the course of old ones, were continued, but it was provided that the jury by which the damages were to be assessed should consist of seven, instead of twelve, men, and that it should be selected by the marshal, instead of by a justice of the peace. As to the assessment of damages this section provided, "And the marshal shall summon such jury and administer an oath or affirmation to them, that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises; *but in doing this they shall take into consideration the benefit it may be to him or her by enhancing the value of his or her land, or otherwise, and give their verdict accordingly.*"

By section 40 of the act of February 21, 1871, entitled "An act to provide a government for the District of Columbia (16 Stat., 419, 428) the levy court was abolished, and the duties of that court devolved on other officers.

In the revision of 1874, those parts of the foregoing statutes which were then in force were incorporated into sections 252 to 265, inclusive, of the Revised Statutes relating to the District of Columbia—section 161 being as follows:

"In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land or otherwise and give their verdict accordingly."

By subsequent legislation in 1874 (18 Stat., 116), and in 1878 (20 Stat., 102), the powers which had theretofore been vested in other officers—including those originally given to the levy court—were transferred to the Commissioners of the District of Columbia.

Under the statutes referred to, from 1812 to the present day, it has been the uniform rule in opening highways in that part of the District outside of the cities of Washington and Georgetown, in estimating the damages sustained by the owner of land, a part only of which is taken, to take into consideration the benefit which he will receive from the opening of the highway.

We are not aware of any decision of any of the local courts as to the validity of this practice under the statutes referred to. So far as we have been able to ascertain, the right to make such deduction has never been questioned in the courts in any proceeding under these laws or any of them.

By an act approved March 3, 1825 (4 Stat., 101), Congress in general terms ratified and affirmed an act of the legislature of the State of Virginia, entitled "An act incorporating the Chesapeake and Ohio Canal Company" so far as might be necessary to enable that company to carry into effect in the District of Columbia the provisions of the Virginia statute. In 1829, application having been made to the circuit court of the District of Columbia to affirm the condemnation, at the instance of the Chesapeake and Ohio Canal Company,

of certain land in the District, the counsel for the land owner made several objections to the proceeding, one of them being that the Virginia act did not give the land owner just compensation in that it required him to be paid partly or wholly in benefits to the part of his land which was not taken. Chief Justice Cranch, delivering the unanimous opinion of the court on this subject, said :

"The question then, is, whether the charter provides for making a just compensation.

"It is said that it does not, because it directs that, 'in every such valuation and assessment of damages, the jury shall be, and they are hereby instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner from conducting the canal through, or erecting any of the said works upon his land, and to regulate their verdict thereby ; except that no assessment shall require any such owner to pay or contribute anything to the said company, where such benefits shall exceed, in the estimate of the jury, the value and damages ascertained as aforesaid.'

"It is contended, that the Constitution provides a positive, not a conjectural compensation ; that under the provisions of this charter, it may happen that no compensation at all may be made ; that the expected benefits which the jury shall have estimated may never arrive ; and that, therefore, the jury should not have been required, by the charter, to consider them in their estimate of value and damages.

"But the Constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority, which should give the power to take the private property for public use. All the States, prior to the adoption of the Constitution, exercised this right, and still continue to exercise it where it is necessary to condemn land for roads and other public uses ; and they have generally provided for compensation through the intervention of a jury.

"It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal

to examine the circumstances of each case and to estimate the just compensation. If the jury had not been required by the charter to consider the benefit as well as the damage, they would still have been at liberty to do so, for the Constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation to give him the full value. If the jury would have a right to consider the benefit as well as the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that under the provisions of the charter it might happen that no compensation at all, or, at most, a nominal compensation would be made. The insertion, therefore, of that provision in the charter which requires the jury to do what they would be compentent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public as well as just towards the individual they ought to do, cannot be considered as repugnant to the Constitution."

Chesapeake & Ohio Canal Co. *vs.* Key, 3 Cranch Cir. Ct. Rep., 600–601.

In a subsequent case arising under the same statute in the Circuit Court of the District, an objection was made to the affirmation of condemnation proceedings that the jury had not found the value of the land taken and the damages separately, but had rendered them in one sum. On this subject, Chief Justice Cranch, delivering the opinion of the court, said:

"The oath is to 'value the land and all damages,' &c., 'and in every such valuation and assessment of damages,' the jury are 'instructed to consider, in determining and fixing the amount thereof, the actual benefit,' &c., 'and to

regulate their verdict thereby;' except, that 'where such benefit shall exceed,' in the estimate of the jury, 'the value and damages ascertained as aforesaid,' the owner shall not be required 'to pay or contribute anything to the said company.'

"The benefits to be derived, therefore, may be as well set off against the value of the land as against the damages, and we see no reason why the jury may not find the result in one entire sum."

Ches. & Ohio Canal Co. *vs.* Union Bank of Georgetown, 4 Cranch C. Ct. Rep., 79, 80.

In 1893 Congress passed an act providing for the extension of North Capitol street to the Soldiers' Home (28 Stat., 20). This statute authorized condemnation proceedings before commissioners to be appointed by the court. In a proceeding as to certain land known as the Barbour tract, the commissioners assessed the value of the land taken at $21,078, but found that the benefit to the remainder of that tract would be $18,530. The court affirmed the award as to the damages, but excluded the benefits altogether, entering judgment for the full amount of $21,078. In doing this, Mr. Justice Cox, who was the presiding justice, based his action solely upon the ground that there was no provision, in the statute authorizing the proceedings, for the deduction of benefits. The District appealed to the Court of Appeals, where the judgment below was affirmed. Mr. Justice Morris, who delivered the opinion of the court in that case, after referring to the fact that the statute made no provision for the deduction of benefits, and that they could not, therefore, be considered, went on to say in substance that the land owners could not be charged with the benefits until the street should be opened and improved. (District of Columbia *vs.* Cemetery, 5 App. Cas., D. C., 518.) This was the first time, to our knowledge, that the right of deduction for benefits which had been constantly exercised in the District for over eighty years, was questioned in any court.

By an act approved August 1, 1892, entitled "An act to incorporate the Maryland and Washington Railway Com-

pany" (27 Stat., 341), that company was authorized to construct a railway in the District upon which cars might be propelled by mechanical power, other than steam. Section 24 of the act authorized the condemnation of land for the use of the railroad "in the usual way in the Supreme Court of the District of Columbia, under such rules and regulations as said court may prescribe for such purposes." Under the general incorporation law of the District of Columbia, railway corporations organized under that act were authorized to condemn land needed for their road. (See sections 647 to 663 of the Revised Statutes D. D.) This act contains no provision for the deduction of benefits. In proceedings to condemn a tract of land for the use of the Maryland and Washington Railway Company, the commissioners appointed by the court found the benefit to the part of the land not taken to be $1,500. The court refused to deduct this sum from the amount awarded for the land taken, and on appeal the court of appeals sustained its judgment. Mr. Justice Shepard, delivering the opinion of the court, after referring to the fact that the act under discussion did not authorize the deduction of benefits, proceeded to discuss the general question, and reached the conclusion that in no case where land is condemned for public use may the authorities in fixing the compensation for the part of a tract actually taken, take into consideration the benefit to the remainder (24 Wash. Law Rep., 249). At the end of the opinion in this case there is this note:

"Alvey, Chief Justice, concurs in the judgment of affirmance but not in all the reasoning of the opinion."

It is believed that the foregoing are all the decisions affecting the question under consideration rendered by any of the local courts of the District of Columbia down to the time of the decision now under review.

(*b*.) The decisions of the Supreme Court of the United States.

This question of the deduction of benefits was involved, but seems not to have been much discussed, in the case of Kennedy *v*. Indianapolis, 103 U. S., 599-604. An Indiana

statute authorized the construction of a canal, and provided that in making appraisement of the value of the land taken for the canal, "*the benefits resulting to the claimant from the construction of the work*" were to be taken into consideration. Parts of two lots owned by one Van Blaricum were condemned for the use of the canal, and when he presented his claim for damages it was held that he was not entitled to any for the reason that the benefit to the parts not taken equalled the value of the parts taken. The owner of another lot—one Coe—waived his claim to compensation. As a matter of fact, however, the canal was never finished. A question then arose as to the ownership of the lots of Van Blaricum and Coe which had been condemned. In discussing the case, Chief Justice Waite, delivering the opinion of this court, said:

"It would seem to follow that *if the canal was constructed the compensation which the constitution guaranteed the owner would be made;* otherwise not. If the canal was in law built the title passed to the State; if not, it remained in the owner."

The court proceeds to hold that as the canal was never in fact constructed, the title to the land was in those claiming under Van Blaricum and Coe.

In the more recent case of Monongahela Navigation Company *v.* United States, 148 U. S., 312-326, an act of Congress was considered which authorized the condemnation of a lock and dam belonging to the Navigation Company, and which contained a proviso that in estimating the sum to be paid by the United States "the franchise of said corporation to collect tolls shall not be considered or estimated." This court held that what is just compensation under the Fifth Amendment is a question for the courts; that the franchise to receive tolls was such property as the Navigation Company was entitled to compensation for, and that the proviso was void.

This case was much relied upon by counsel for the landowners in these cases in the courts below, but it is not cited in any of the opinions in the case as supporting the conten-

tion of counsel in this particular. That this court did not intend to commit itself to the proposition that benefits in proper cases may not be deducted is clear. Mr. Justice Brewer, in delivering the opinion of the court in that case, at page 326, expressly said: "We do not in this refer to a case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent which the benefits or injuries to the portion not taken may be brought into consideration."

(c). The text writers.

In his work on Constitutional Limitations Judge Cooley discusses this matter at considerable length, and the conclusion which he reaches he thus states:

"When, however, only a portion of a parcel of land is appropriated, just compensation may perhaps depend upon the effect which the appropriation may have on the owner's interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if in consequence it is given a front, or two fronts upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damnified by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public use by the owners of lands, without any other compensation or expectation of compensation than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements, which are supposed to be of peculiar value to the locality in which they are made. But, where, on the other hand, a railroad is laid out across a man's premises, running between his house and his out-buildings, necessitating, perhaps, the removal of some of them, or upon

such a grade as to render deep cutting or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risk of accidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation.

"It seems clear that in these cases it is proper and just that the injuries suffered and the benefits received by the proprietor, as owner of the remaining portion of the land, should be taken into account in measuring the compensation. This, indeed, is generally conceded; but what injuries shall be allowed for, or what benefits estimated, is not always so apparent. The question, as we find it considered by the authorities, seems to be, not so much what the value is of that which is taken, but whether what remains is reduced in value by the appropriation, and if so, to what extent; in other words, what pecuniary injury the owner sustains by a part of his land being appropriated. But, in estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken.

"The question, then, in these cases, relates first to the value of the land appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered how much the

portion not taken is increased or diminished in value in consequence of the appropriation."

Cooley's Constitutional Limitations, pp. 697 to 700.

Judge Dillon in his work on Municipal Corporations takes the same view of this matter. He says:

"The author must content himself with a statement of those rules or general principles he believes to be the best supported by reason and which embrace the cases ordinarily arising in connection with the exercise of the right of eminent domain by municipalities, whose chief occasion for the power is to open and establish streets and ways. The rules here laid down are, of course, subject to modification by any special constitutional provision or legislative enactment varying them. * * * If, however, as most commonly happens, *part* only of the property is to be taken, more embarrassing questions are apt to arise, in determining which regard must be had to the condition as to the shape, use, and convenience in which the residue of the property will be left, and how its value will be affected by that which is taken for the proposed improvement. And here usually arises the difficult inquiry: What benefits and what injuries are proper to be regarded as affecting the question of damages? Now, benefits and injuries are of two kinds: 1. General or public, being such as are not peculiar to the particular proprietor, part of whose property is taken, but those benefits which he shares and those injuries which he sustains in common with the community or locality at large. 2. Special or local, being those peculiar to the particular landowner, part of whose property is appropriated, and which are not common to the community or locality at large—such, on the one hand, as rendering his adjoining lands more useful and convenient to him, or otherwise giving them a peculiar increase in value; and, on the other, rendering them less useful or convenient, or otherwise in a peculiar way diminishing their value. The former class of benefits or injuries—namely, those which are general and not special—have, according to the almost uniform course of decision, no place in the inquiry

of damages, and cannot be considered for the purpose of reducing the amount, being too indirect and contingent; but injuries which specially affect the proprietor, or benefits which are specially conferred upon his adjacent property, part of which is taken, are to be considered, unless, by the constitution of the State or legislative enactment, *all* benefits, special as well as general, are to be excluded.

"Applying these principles, *a proper and practical general rule* is to first ascertain the fair market value of the entire premises, part of which is proposed to be taken, *not* necessarily irrespective of such improvement, but irrespective of the causes which have contributed to that value; then ascertain the like value of the premises in the condition in which they will be after the part is taken, without deduction for general benefit which will result from the proposed improvement; but, unless specially excluded by positive law, deducting special benefits as above defined; and the difference in value, be it more or less than the value of the part taken, will constitute the measure of compensation. Even without an express provision of law requiring that there shall be no deduction for benefits, it seems to the author unjust to require that the value of the land shall be ascertained irrespective of those general benefits which are common to all land in the vicinity and which arise out of the proposed improvement; and the rule held by some courts, that these benefits shall be excluded in ascertaining the value of the whole land in the first instance and then allowing to be deducted from this sum the value of the remaining portion after the improvement is made, is still more indefensible, and it was the general conviction of the injustice of such a rule that has led to so many constitutional provisions and legislative enactments prohibiting the landowner from being charged with benefits. But for benefits, direct and special to him, he should be charged in making the estimate of the amount to which he is justly entitled, unless, by the constitution or statute, even such benefits are not to be considered."

2 Dill. on Mun. Cor., Secs. 624–625.

In Lewis on Eminent Domain, on this subject the author says:

"The law in regard to benefits is now pretty well settled in every State, either by the decisions of its courts, or by its statutes, or its constitution. While different and conflicting rules prevail in the different States under precisely the same constitutional provisions, it is evident that there can be but one absolutely correct rule. In taking private property for public use the State acts rightfully and not as a wrong-doer. It guarantees *just* compensation, and nothing more. In arriving at what is just compensation the matter is to be viewed in the same light as though the State had bargained with the owner for a portion of his land, and had agreed to make him a just compensation therefor. It is self-evident that, where a part of a tract is taken, the just compensation cannot be determined without considering the manner in which the part is taken, the purpose for which it is taken, and the effect of the taking upon that which remains. All the authorities concede this so far as damages to the remainder are concerned, and the justice of so doing may be taken for granted. But what justice is there in considering the effect in so far as it produces damage only? If a railroad is constructed through a farm and drains a valuable spring whereby the remainder is depreciated five hundred dollars, it is conceded that just compensation must include this five hundred dollars. But if, instead of draining a valuable spring, it drains a marshy tract so as to make it worth five hundred dollars more for actual use, the same sense of justice requires that this five hundred dollars of benefits should be considered. It seems to us that there is no answer to this position.

"The distinction which is taken by so many courts between the value of the part taken and damages to the remainder, seems to us wholly without foundation. This is very clearly demonstrated by the Supreme Court of Minnesota in an early case from which we quote as follows:

"'I am unable to see a ground for any such distinction. It seems to me the right to compensation for both elements of damage is found in the same source, the fundamental right

of the citizen to just compensation when his private property is taken for public use. The compensatien is for the taking and its proximate consequences ; otherwise, it leaves the right of the citizen to redress for these *consequences* at the option of the legislature, to which I do not assent. To take land of the citizen for public use by the State when necessary, is an essential incident to sovereignty. The right of *eminent domain* is not conferred by the constitution; but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress. If, therefore, the limitation extends only to requiring compensation for the *land* taken any other injury being done under the power of *eminent domain*, and in pursuance of statute, must be *damnum absque injuria*, and the citizen has no redress. This would take from the principle contained in the constitutional provision half its virtue, and in many, if not in most cases, render the citizen comparatively without remedy. For in this day we know that, in many cases, the value of the strip of land actually taken for a railroad, is but a small portion of the actual damage to the owner by the construction of the road through his land. Nor can I discover that the nature of the injury is more aggravated, or the right infringed more sacred, in one case than the other. In one instance the possession of a small part of a tract of land may be taken, and in the other the whole tract or parcel may be rendered comparatively useless or valueless. The constitution should receive no such narrow and techinal construction. It was intended to declare a fundamental principle of government, that when the public exigency requires the Government to take for public use the property of the citizen, full compensation shall be made for the injury ; not only the value of the portion of land taken, but the damages caused by taking it.'

Const. art. 1, sec. 13.
Ib. art. 10, sec. 4.
Pet. of Mt. Wash. R. Co., 35 N. H., 146.

" If this view is correct, then the damages are a unit, although composed of integral parts; and if benefits are to be

deducted at all, they must be deducted from the aggregate sum; and it would seem but just and equitable that if the same act at the same time inflicts injury and confers benefits, the one should be set off against the other in determining the compensation due for the injury; then a just and full compensation is ascertained; and, thus ascertained, must be paid in money.

"It follows, therefore, that benefits may not only be offset against the damages to the remainder, but also against the value of the part taken. * * *

"Where part of a tract is taken, just compensation would, therefore, consist of the value of the part taken and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed; or, what is the same thing, it is the value of the whole tract irrespective of the taking less the value of that which is not taken, taking into consideration the purpose for which the part taken is to be used and excluding any but special benefits to the property which remains. Just compensation, thus estimated, is a sum of money which makes the owner whole, and in respect to general benefits or damages resulting from the work or improvement, leaves him in as good a situation as his neighbor, no part of whose property has been taken."

Lewis on Eminent Domain, Sec. 471.

To the same effect are Randolph on Eminent Domain, Secs. 225 and 265 to 273; and Elliott on Roads, 186-7.

(*d*). Decisions in the State courts.

The text writers from whom we have quoted review and classify the decisions in the State courts, and we do not deem it necessary to here array all the decisions in the various State tribunals before which the question of the deduction of benefits has come. We select a few cases which will show the various lines of reasoning by which the conclusion has been reached that "just compensation" does not necessarily mean

payment in money. We say "just compensation" because, while the fifth amendment to the Constitution of the United States does not restrict the legislatures of the States, we find that all the State constitutions discussed in the cases to which we refer contained a provision which was substantially the same on this subject. Indeed, the view of the courts seems to be that without any constitutional provision the same results would be reached.

We are aware of the fact that in one or two of the States in which the decisions to which we are about to refer occurred, by subsequent amendments to their constitutions, the deduction of benefits has been prohibited. This, however, cannot effect the value of the cases as precedents in the Federal courts. The very fact that such amendments were made indicates that without them compensation in benefits would have been permissible. And we have seen that the only practical result of these amendments in street-opening cases has been that the landowner has been required to pay back with interest so much of his compensation as originally would have been deducted from the amount due him.

We refer, first, to the case of Commissioners *vs.* O'Sullivan, 17 Kan., 59, because the opinion of the Supreme Court of Kansas in that case was delivered by a learned justice who is now a member of this court, and who delivered the opinion of this court in the case of Monongahela Navigation Co. *vs.* U. S. (148 U. S., 312), which is relied upon by opposing counsel (entirely without reason, as we think) as indicating that in the view of this court the deduction of benefits is not valid. In the Kansas case referred to, Mr. Justice Brewer, delivering the unanimous opinion of the court, said:

"Outside of any special constitutional or statutory restrictions, the right of the State to take private property for public use, and the corresponding right of the individual to receive compensation for the property thus taken, may be assumed. * * * This compensation is secured if the individual receives an amount which, with the direct benefit accruing, will equal the loss sustained by the appropriation.

"We of course exclude the indirect and general benefits

which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation; otherwise he is favored above the the rest, and instead of being simply made whole, he profits by the appropriation and the taxes of the others must be increased for his special advantage. Upon general principles then, and with due regard to right and justice, it should be held that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained."

In a later case, in the same State, the foregoing decision was followed in a case where a road was opened through a tract of land and the jury found the value of the land actually taken to be $129.33, and that a new fence would cost the owner $80, but found also that the benefits resulting to the owner of the land would be $200. In the court below judgment was entered for the landowner for the difference between his damages and the benefits—$9.33—and on appeal the Supreme Court affirmed the judgment (Tobie *vs.* Brown County, 20 Kan., 14). In a still later case in the same State, where the value of the land taken was found to be $40 and the benefits $50, so that the landowner received nothing, the Supreme Court sustained the judgment below.

Trospea *vs.* Commissioners of Saline Co., 27 Kan., 393.

The case of Meacham *vs.* Fitchburg Railroad Co., 4 Cush., 297, is a leading case in Massachusetts in the same direction. In that case a part of a tract of land was condemned for the use of a railroad, and the jury were instructed to deduct from the value of the part taken special benefits to the remainder

of the tract for laying out the road. It was held that this was correct, the court saying:

"It is difficult to draw a line with precision and at the same time to establish a rule which will do equal justice to all concerned. The rule which was taken at the hearing before the jury, we think, approximates as nearly to the standard as any that can be adopted. It embraces the land as to which damages are claimed, and any of the land of the petitioner adjoining, or connected therewith as one parcel or tract of land, and if in any portion of such land the location of the railroad has occasioned a rise in value, and the petitioner has received any peculiar benefit from the location of such road, it is the duty of the jury to make a deduction by way of set-off and a reduction of damages on account of such advance in value of the remaining portion of the lot or parcel of land. Thus limited to the land adjacent to that taken for the railroad, or connected as one tract or parcel of land therewith, the rule will be found to be reasonable in itself and of easy application. The great and leading principle, to authorize such reduction of benefits, is the direct benefit or increase of value to the remaining part of the tract or parcel of land by reason of the railroad's passing through the lot or tract, as to which damages are claimed. We approximate very nearly in this way to the rule of direct benefit or actual increase of value in the adjacent land, and exclude the more uncertain and fanciful estimated or anticipated advantages to other parcels more or less remote, and which share only in the common benefit of the lands of the citizens generally. * * *

"It is the increase of value occasioned by the location, and, of course, has reference to the state of things existing at the time when the land is taken by the location. The presiding officer directed the jury to take the earliest period indicating such location, namely, 'the staking out of the road.' This being most favorable for the respondents, it is unnecessary to decide whether that period or the subsequent one of the actual official return of the real location would have been, strictly speaking, the more correct. The principle adopted was the right one, that the actual location of the road was

the period of time in reference to which the increased value of the adjacent land was to be estimated with a view to the set-off."

This case seems to have been followed in Massachusetts ever since, the only questions that are discussed in the later cases being as to the particular benefits which may or may not be deducted. Thus in proceedings for laying out Canal street in Charlestown, the jury were instructed to deduct benefits, but the sheriff told the jury that if all or nearly all the estates abutting on the street were benefited in a similar manner, then the benefit to the particular lot could not be deducted. This was held to be error, the court saying:

"If these proceedings were taken under the general statutes and not under the betterment acts, so called, this instruction was clearly wrong. The benefit is not the less direct and special to the land of the petitioner, because other estates upon the same street are benefited in a similar manner. The kind of benefit which is not allowed to be estimated for the purpose of such deduction is that which comes from sharing in the common advantage and convenience of increased public facilities and the general advance in value of real estate in the vicinity by reason thereof. (Meacham *vs* Fitchburg Railroad Co., 4 Cush., 291; Upton *vs.* South Reading Branch Railroad Co., 8 Cush., 600; Dickenson *vs.* Fitchburg, 13 Gray, 546.) The advantages of more convenient access to the particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same in greater or less degree with each and every lot of land upon the same street. But such advantages are direct and special to each lot. There are in no proper sense common because there are several estates, or many even that are similarly benefited." (Whitman *vs.* Boston and Maine Railroad Co., 3 Allen, 133, and 7 Allen, 313.)

Allen *vs.* Charlestown, 109 Mass., 243–246.
See, too, Sexton *vs.* Bridgewater, 116 Mass., 203.

In an early case in Indiana, where land was condemned

for a railroad whose charter required the deduction of benefits, the jury in the particular case found that the benefits equaled the damages and gave the landowner nothing. On appeal the Supreme Court of Indiana investigated the matter very carefully and delivered an able opinion, which is too long to be inserted here, but from which we make the following quotation:

"From this review of the statutes bearing on the question before us, and embracing the very time of the adoption of the Constitution, we cannot doubt that its authors in providing that 'just compensation' should be made for private property taken for public use, designed to convey the meaning which had been attached to that phrase by the community for more than seventeen years, and which has since remained unquestioned for a longer period of time. That meaning is, not that property thus taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer in consequence of the exercise of the right of eminent domain over his property shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains. In ascertaining the extent of the injury, undoubtedly, an estimation of the value of the property taken, at the time of taking, is a necessary step; but if the benefits real and substantial resulting to the claimant equal in pecuniary value the value of that which the public has deprived him, we conceive they constitute a just and constitutional compensation for the deprivation to which he has been subjected; and such, in our opinion, is the nature of the benefit contemplated by the statute in question—the enhancement of the value of property by the construction of a public improvement."

McIntire *vs.* State, 5 Blackf., 384, 386.

This case we find approved and followed in Hagaman *vs.* Moore, 84 Ind., 496, and Rassier *vs.* Grimmer, 130 Ind., 223.

In a railroad case in Illinois, the judge who presided at the trial below instructed the jury not to deduct benefits. On appeal this was held to be error, the court saying:

"It is obvious from these various provisions of the statute that the legislature never contemplated the payment of damages to the owner of a tract of land for the privilege of constructing the railroad through it when the additional value to be given to the land by its construction was fully equal to the injury which it had occasioned. If additional value is given to the land by construction of the public work, it matters not whether it be by draining the land which was before wet, by affording additional facilities for taking its products to market, or by the general enhancement in the value of the land occasioned by its contiguity to the public work. The language of the statute is general, and there is no propriety in restricting the benefits to be derived from the construction of the railroad, if of a real and substantial character, to such only as arise from a particular source, or for confining them to one class of benefits more than another. It is immaterial how the owner of the land is benefited, or that others whose lands are not entered upon are benefited to an equal or even greater extent. It is enough that the value of his land is enhanced by the construction of the railroad through it, and he has no right to complain that the enhancement is not peculiar to him alone. It might as well be insisted that the increased value given to a marsh not before tillable by cutting a canal through it so as to drain it, should not be taken into consideration in estimating the advantages which the owner of such marsh would derive from the construction of the canal, as that the construction of a railroad and the additional value given to the land along its immediate line should be excluded in estimating the advantages of such road to the properietor. One is as much a real benefit as the other. * * *

"There is nothing in this view which interferes with any constitutional provision. The 11th section of the 13th article of that instrument declares that no man's property 'shall be taken or applied to public use without the consent of his

representatives in the general assembly, nor without just compensation being made to him.' The word compensation means that which is given as an equivalent for a loss; and the Constitution does not determine how that equivalent shall be made up. If the advantages really and substantially resulting from the increased value given to that part of a tract of land not taken for public use are equal to the damages which the owner will sustain by the deprivation to which he is subjected, then in the very act of appropriating part of his land to the public use an equivalent is rendered him in the increased value given to the rest. In such a case it cannot in any just sense be said that any portion of his property has been taken, and consequently he is entitled to no compensation. It is true his property has undergone a change without his consent, but it is because the public exigency required it; and the same change occurs in every case even where there are no benefits to be assessed and the compensation is made in money. The value of a man's property remains the same in both cases, though there is a difference in the modes of making compensation. The cases of McIntire *vs.* State, 5 Blackf., 384, and of Symond *vs.* City of Cincinnati, 14 Ohio, 147, are in point upon this branch of the case."

Alton *vs.* Sangamon Railroad Co. *vs.* Carpenter, 14 Ill., 190.

A case well worthy of consideration on this subject is Winona R. R. Co. *vs.* Waldron, 11 Minn., 414, in which case a strip of land through a farm was taken for the use of the railroad. The court before which the proceedings took place instructed the jury "Against the market value of the land taken you will offset nothing whatever." This was held to be error. The principal parts of the opinion are included in ths quotation which we have given above from Lewis on Eminent Domain.

One of the most thorough discussions of this subject to be found anywhere is contained in the opinion of the Supreme Court of Missouri in Newby *vs.* Platt County, 25 Mo., 255,

264, 272, 273. In that case a part of a tract of land was taken and benefits to the remainder of the tract were deducted. The Supreme Court held this to be constitutional and just. The following are brief extracts from the opinion:

"The Government, however, possesses other powers over private property besides the right of eminent domain; and if, in the exercise of the taxing power, the Government may lawfully require the adjacent landowners to contribute towards paying for the right of way in proportion to the benefit each will derive from the road, the present enactment, so far as it directs the advantages of the road to be deducted from the price of the land, must perhaps be considered as an exercise of the taxing power. This law is, indeed, nothing more in effect than the exercise of both powers of Government in the same breath—that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent landowners to contribute to the cost of it in proportion to the benefit each will derive from the road."

* * * * * * *

"Our conclusion in favor of the validity of the provision under consideration, to which we have thus come by considering the question on principle, is corroborated by the mass of judicial decisions in the other States on the subject. The American constitutions generally, as already observed, contain the same provision for the protection of private property to be found in our own, and a similar statute provision has been generally adopted throughout the United States in reference to the assessment of the damages for land taken, whether by the public or private corporations, for public roads and canals, as well as for turnpikes and plank roads and railways; and Virginia, Kentucky, and Tennessee are, we believe, the only States in which the provision has been treated by the courts as invalid. (James River and Kanawha Co. *vs.* Turner, 9 Leigh, 315–341; Woodfolk *vs.* The Nashville and Chattanooga Railroad Co., 2 Swan, 422, and Jacobs *vs.* The City of Louisville, 9 Dana, 114.)

"In many of the States its constitutional validity has been expressly affirmed by the courts, while in others it has been

silently acquiesced in, and we refer to the following authorities for the course of American legislation and judicial decisions upon the subject. In many of these cases the decision is put on the ground that the Government is only bound to indemnify the owner against whatever damage may result to him from the application of his property to the public use, which, although different from the ground on which our decision is placed, produces under our existing laws the same practical result in the assessment of the damages." (Mass.—Rev. Stat., chap. 24, sec. 31; Commonwealth *vs.* Combs, 2 Mass., 492; Commonwealth *vs.* Sessions of Middlesex, 9 Mass., 370; Commonwealth *vs.* Norfolk Sessions, 5 Mass., 436. New York—2 Rev. Stat., 412; Livingston *vs.* Mayor of New York, 8 Wend., 80; The People *vs.* Mayor of Brooklyn, 4 Comst., 428. Pennsylvania Railroad Co. *vs.* Heister, 8 Penn. State Rep., 447; McMasters *vs.* The Commonwealth, 3 Watts, 294. Ill.—Alton & Sangamon Railroad Co. *vs.* Carpenter, 14 Ill., 199. Ohio—Symonds *vs.* City of Cincinnati, 14 Ohio, 147. Alabama—Code 1852, p. 257, sec. 1136, 27 Miss., 210. Vermont—Compiled Stat. of 1850, p. 173, sec. 67. Maryland—5 Gill., 388; 1 Mary., 540; 5 Mary., 314. Indiana—The State *vs.* McIntyre, 5 Blackf., 386.)"

The Supreme Court of Missouri has held that under the new constitution of that State the same rule prevails.

Dougherty *vs.* Brown, 91 Mo., 26.

In Pennsylvania there seems never to have been any serious controversy on this subject, the only questions discussed by the courts of that State being as to what benefits may be deducted and what may not.

See Setzler *vs.* P. S. V. R. R. Co., 112 Pa. St., 56.
Long *vs.* Harrisburg R. R. Co., 126 Pa. St., 143.

In Connecticut this matter has been very thoroughly discussed and the same result reached.

Nicholson *vs.* R. C., 22 Conn., 174.
Nichols *vs.* Bridgeport, 23 Conn., 200.
Trinity College *vs.* Hartford, 32 Conn., 452.

These cases will reward careful reading.

We submit that upon the point now under consideration the courts should hold:

1. That since till nearly a hundred years after this District was ceded to the United States, Congress and the courts uniformily construed those clauses of the Constitution which govern Congress in exercising the right of eminent domain in the District of Columbia as giving it the power to require that where a part of a tract is taken the benefit to the part not taken may be deducted from the value of the part taken, that will be taken to be the true construction and will not now be disturbed.

2. That the great weight of authority both in the courts of the States and in the works of text writers entitled to respect is in favor of the established construction.

3. That the words "just compensation" in the fifth amendment mean just to the public as well as just to the land owner, and that it would be unjust to the public to require the land owner to be enriched at its expense.

4. That "just compensation" for land taken for public use requires that where a part of a tract, only, is taken the injury done to the remainder by the proceedings shall be made good in addition to payment for the part taken, and that for the same reason where the part not taken is benefited, the amount of that benefit may be properly taken into consideration as a part of the compensation to which the owner is entitled.

5. That as all concede the benefits may be assessed in the exercise of the taxing power it is an unreasonable construction of the Constitution to say that the Government may not withhold what it has the undoubted right to immediately take back.

Second. Section 11 does not require the deduction of benefits to arise from the actual grading and improvement of the streets and avenues on the map, but only such as are consequent upon the legal establishment of such *highways and the creation of a right of way thereover in the public.*

Mr. Justice Cox, while holding that special benefits may be deducted when they are immediate and clear, held that the section under consideration compels the court to consider benefits that may accrue to the land owner when the street is actually "opened" and improved (Record, 631 and 632, pages 31 to 37).

In the Court of Appeals none of the justices took this view of the section. In the majority opinion it was held invalid because benefits cannot be deducted in any case (43). In his dissenting opinion Mr. Chief Justice Alvey says, in substance, that it is to be presumed that the actual opening and improvement of the street will follow the condemnation proceedings in a reasonable time (55).

It is a rule too well settled in this court to require a reference to the decisions of the court, that where an act of Congress is capable of two constructions, one of which will make it conform to the Constitution, while the other will not, every reasonable intendment will be made in favor of that construction which will make it valid. And it is respectfully submitted that in this case the natural—and indeed the only reasonable—construction of section 11 is that such benefits are to be deducted as will follow from the laying out of the highways and the condemnation of the land covered by them and which are capable of being established with reasonable certainty.

Section 6 of the act relates to the condemnation of land in existing subdivisions, and directs speedy proceedings in such cases. Section 7 relates to the condemnation of land outside of existing subdivisions, and provides that in such cases the condemnation proceedings shall go on only after the Commissioners and the court have decided that the public convenience "does, in fact, require the immediate opening of the highway." The reason for this distinction is apparent. In the existing subdivisions voluntary dedication of the new highways would seldom, if ever, occur. The owners of the lots in them would go on using such streets as they already have, and would continue building upon their lots. From this cause, and the constant increase in value of land in

these subdivisions, the cost of condemning the land in them would, in a few years, be enormously increased. Outside of existing subdivisions, however, since new subdivisions could be recorded only when made in conformity with the plan, the natural result would be that in most cases the land would be dedicated by the voluntary act of the land owner, and that there would be little, if any, building on the lines of the proposed streets between the time of the filing of the map and the institution of condemnation proceedings in the few cases in which such proceedings would be required.

All the sections of the act which follow section 9 refer to both classes of proceedings. Section 11 is one of these, and it provides that the jury in assessing the damages shall take into consideration "the benefit *the purpose for which it is taken* may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same."

Mr. Justice Cox held, first, that section 11 must be construed in connection with section 15; and, second, that as the latter section requires that the assessment shall be made upon lands benefited "by the laying out and opening of such highways," and that since in doing this, the jury are to make due allowance for any amount which may have been deducted for benefits in making compensation for land taken, "it is plain that the benefits provided for in both sections are of the same kind." He concludes therefore that when land in existing subdivisions are condemned, the deduction for benefits must include benefits resulting from the future and uncertain improvement of the street. From this conclusion we respectfully, but emphatically, dissent. Whether the proceedings are conducted under section 6 for the immediate condemnation of land in an existing subdivision, or under section 7, after it has been determined that public convenience requires the immediate opening of a highway outside of an existing subdivision, all that this act provides for is the condemnation of the land. It is nowhere directed or suggested that the streets when condemned shall be graded, and much less is there any provision for paving them or otherwise im-

proving them. The only difference is, that in proceedings under section 7 the probability of immediate grading and improvement is stronger than in the other. But it is impossible to find in any part of the act anything which binds Congress, after a condemnation shall have been made in any case, to actually grade or improve the street. Therefore, when the words "laying out and opening" are used in section 15, they mean no more than throwing the land open to travel. When the plat is recorded, the condemnation proceedings instituted, and the damages ascertained and paid, the highway is laid out and opened. If there be subsequent improvement in the way of paving, grading or otherwise, either *in an existing subdivision or out of it*, that may be the subject of another and separate assessment.

The system thus prescribed, so far as we have been able to find, is the one which is in vogue, and has been used from time immemorial in all the principal cities of the United States—indeed, in every town in the country. In the charters of these municipal corporations we invariably find that the provisions relating to the exercise of the right of eminent domain in the opening of highways into the suburbs are separate and distinct from those which relate to improving them. And almost uniformly not only, as here, one-half the cost of the land condemned, but all of it, is paid by the land benefited. Even in jurisdictions where the deduction of benefits is forbidden by constitutional or statutory provision an assessment follows the condemnation proceedings, and the land owner under the assessment pays back with interest in whole or in part what he has received for the part of his land which has been taken.

From the moment the new highway is opened (using that word in the sense merely of giving the public a right of way over it and excluding all idea of grading or other improvement), the owners of land abutting on it have such an easement appurtenent to their own lots as gives them a great and special advantage over the public at large.

In some of the streets in existing subdivisions there are no improvements whatever. In many cases it would take

a surveyor to find the streets. But if such streets are abandoned by the new map, are not the owners of the abutting lots entitled to compensation? And if taking away a street that exists only on paper, and in law, is an injury, which may be estimated in damages, why may not the benefits be computed from creating such an easement?

The illustrations of this principle, that land on or near a newly projected street is specially benefited by the mere opening of the street—that is, the platting of it and the condemnation of the land, without any grading or other improvements—are numerous and obvious to everybody. When it was determined to locate the capital of the United States on the Potomac River, and the District of Columbia, as it originally existed, had been selected for that purpose, the owners of the farms where the city now stands voluntarily, and without any compensation other than the benefit which they expected to derive from the location of the capital here, conveyed all their land to commisssioners representing the Government, who were empowered to lay out such highways as they pleased, and to divide the land remaining into squares and lots, and the owners agreed to take back one-half of the lots, giving to the Government all the land occupied by the streets and avenues and one-half the lots in each of the several squares. The effect of this was that they gave up about three-fourths of their land on account of the increased value to the remaining one-fourth resulting from the mere platting of the city streets. It was many years before the location of the streets and avenues all over the city was definitely and certainly marked out on the ground. Even now, after a hundred years have passed, there are many streets in the city which have not been improved, and in the last report of the District Commissioners to Congress they state that there are seventy miles of streets in the city of Washington which are to this day totally unimproved. Yet no one doubts that the lots bordering upon these streets have been more valuable because the streets are there.

Outside of the city many subdivisions have been voluntarily made and recorded by the owners of the land, who gave up

to the public use all the highways platted on their subdivisions without any compensation whatever, except the benefit to the remainder of their tracts. Among these are such well-known subdivisions as Mount Pleasant, Columbia Heights, Petworth, LeDroit Park, and Eckington. In none of these subdivisions were any improvements guaranteed by the authorities, and in some of them the owners not only gave up the land covered by the streets, but spent many thousands of dollars in grading, paving and otherwise improving the streets. They considered themselves well repaid for the land they had dedicated to the public use and the money they had thus spent by having the land that was left to them transformed from agricultural property into city lots. This is but the common experience of all large cities. The difficulty in most cases is not that the land is not given when required, but that these subdivisions anticipate the real wants of the community and many streets are created and accepted, for the safekeeping of which the municipal corporations become liable, and which are of little or no practical use to the public.

Within even the city limits the increased value given to lots by having them front upon the streets of proper width—and this wholly without reference to any improvement of the streets—is a matter so notorious that the court will take judicial notice of it. Take any vacant square in the city in which there are alleys, that part of a lot in such a square which fronts upon a street is worth from two to ten times as much as that which fronts upon the alley, because while neither the street nor the alley may be of any present use to the owner of the land, the fact that they are there and may be used at any time by the owner of the lot when he chooses to erect buildings thereon, adds to the *present* value of the property. In the northwest section of the city where such narrow thoroughfares as Corcoran and Riggs streets run parallel with other and wider streets, the lots in the same square which front on the narrow streets are worth much less than those which front the other way—the conditions as to grading and improvements in the two cases being precisely the

same—and the only difference being that one fronts upon a street that is of proper width while the other does not.

Recurring now to sections 11 and 15, it will be seen, we think, that the distinction which Mr. Justice Cox made between them is not warranted, and that in the case of a lot which fronts upon a new street in an existing subdivision, as well as one which fronts upon a new highway outside of the subdivisions which is condemned, because the public convenience requires it to be immediately opened, an immediate and present benefit to the owners of land in the vicinity arises from the mere establishing of the street by the recording of the map and the condemnation of the land which is included within its limits. True, there may be in some cases a building in the line of the new highway. But it is not to be presumed that the authorities will permit such an obstruction to remain. Indeed, it would be a nuisance which anybody might tear down.

Besides, it is to be remembered that in many instances the condemnation is simply to widen an existing street in a subdivision. Look, for instance, at the plat which forms a part of the record in cases Nos. 631 and 632, and it will be seen that Howard Avenue, in the Ingleside subdivision, is now but sixty feet wide, and that fifteen feet is taken off the lots on each side, so as to make the street ninety feet wide. The lots on the south side of that avenue are 116 feet in depth, and will be reduced to 101 feet. The street is already open and in use. The convenience of the public may never require that the additional fifteen feet on each side shall be improved in any way. This strip on each side may be forever left as a parking, so that the real use of it will be by the land owners, the public benefit resulting from the moving back of the building line. The benefit to the adjoining lots is manifest. It is as great now as it will ever be. The street may be improved and reimproved a dozen times, so far as the present carriageway and sidewalks are concerned, and yet, according to the contention of counsel on the other side, there will be no benefit to the owner until his parking is taken

away and the right of the public to go over it as a part of the highway asserted by actual use.

Again, take the case of a farmer whose existing means of exit from his place are insufficient and who buys a right of way through a neighbor's lot to reach a more convenient road. In such case, if their is to be any grading done, any footwalk or other improvement put down, he has to do it himself. But who will say that for that reason the easement he has purchased is of no value—or that if it be condemned for public use along with the land through which it lies, the injury to him is so uncertain and speculative that it cannot be estimated in dollars and cents. And is not a right of way over a great thoroughfare, like Sixteenth street, leading directly to the heart of the Capitol, therefore, a great benefit to the lots that have it and one that may be measured in the same way?

II.

Section 15 of the Act of March 2, 1893, is not unconstitutional.

In substance, this section requires an assessment of one-half the damages for each highway or reservation "condemned and established" under the act upon the lands "benefited by the laying out and opening of such highway or reservation or by the abandonment of an existing highway," and provides that the assessment shall be made by the same jury which assesses the damages. The jury are directed as to any tract a part only of which shall have been taken, to make due allowance for the amount, if any, which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract. When the assessments are confirmed by the court they become a lien on the property assessed and bear interest at 4 per cent. per annum from the date of the confirmation of the assessment.

The only question that can be raised in this court is whether this section is in whole or in part in conflict with the Constitution. Mr. Justice Cox held that the section cannot be enforced, and both the majority opinion in the Court of Appeals

and the dissenting opinion of the Chief Justice of that court are to the same effect. In none of these opinions is it said in terms that the section is unconstitutional. The defects in the section suggested by Mr. Justice Cox are, that as there is to be a separate assessment in regard to each subdivision, and the jury, in making the assessment, are not confined to the land within the subdivision, the same land may be several times assessed by different juries; that to obviate this by having one jury act on all the subdivisions would impose upon that jury an enormous and unreasonable amount of labor, and that the jury in making the assessment is not restricted to any particular district or any particular rule of apportionment. (Rec. in 631, 632, pp. 37, 38, 39.)

In the opinion concurred in by a majority of the justices of the Court of Appeals it is said that "in so far as the general principle of the assessment established by section 15 of this act is concerned, there can be no substantial objection. It is fair, liberal, and regular. One-half only of the cost, and that payable in five annual installments, is to be assessed against the property found to be benefited by the improvement in proportion to the benefits which each tract receives. The benefits are not apportioned by an arbitrary rule of frontage, area, or neighborhood, but are to be ascertained by a jury under the supervision of a competent court, with the same right of appeal as in other cases" (Rec. in 631, 632, p. 46). Mr. Justice Shepard, who delivered the majority opinion, goes on, however, to hold that "section 15 is inoperative by failure to conform to the necessary operations of sections 6 and 7." From the context it will be seen that he holds the section to be "inoperative," because the law does not fix any definite taxing district, but leaves it to the jury in each case to fix the district for itself (46, 47). He adds that another defect in the section is that the assessments bear interest from the date of the confirmation of the assessment by the court, although under the provisions of section 18 of the act, Congress may not accept the assessments, if at all, for a year (47).

In his dissenting opinion Mr. Chief Justice Alvey holds, in substance, that section 15 "is impossible of execution," because it does not fix either the taxing district or the rule of apportionment, and does not confer authority in this regard upon the Commissioners or upon the court (55, 56, 57).

It will be seen that it has been held in effect that Congress had not the power to enact section 15. And since the power of Congress in this matter is limited only by the Constitution, it is apparent that the real effect of these opinions is to hold the section unconstitutional.

The only objections made to the section in question in these opinions which seem to us to require discussion here, are the one given by Justice Cox and by Chief Justice Alvey, that the section does not prescribe the rule of apportionment by which the jury are to be governed in making the assessment, and the one which is concurred in by all four of the justices below, that it does not fix the taxing district. Concisely stated, the objection to the section is that while it directs that one-half the damages shall be assessed upon the land benefited, it does not prescribe any rules by which the jury shall be governed, either in ascertaining what property is benefited or in determining what is "the proper proportional part" of the assessments to be borne by each of the several parcels assessed, but leaves them under such general instructions as the court may give them to determine upon the evidence in each case and after a view of the premises what parcels are benefited and to what extent.

We contend that the conclusions thus rendered by the courts below in this case are not supported either by reason or authority. It is conceded on all hands that it is in the power of Congress to assess one-half the damages upon the property benefited. The law directs that the assessment is to be made by seven men appointed by the court after everybody in interest has had a chance to object to them, and that these seven men before making the assessment must hear the evidence of all the parties in interest, and listen to the arguments that may be submitted by the landowners in person or by their counsel. They are then to be instructed by the

court as to their duties, and thereupon are to proceed to assess the property which they find to be actually benefited to the extent of such benefit. Now, it is said that this is illegal, because Congress should have drawn the lines around a certain district within which the assessment shall be made, and should have laid down some iron rule by which all the land within that district should be assessed. If, for instance, the law had said that the assessment should be upon all the land within the subdivision, or upon all the land within a radius of half a mile of the center thereof, or upon the land abutting upon the highways that are opened and widened, and had further said that within the district thus fixed the assessment should be laid upon all the land, either in proportion to the area of the several parcels or in proportion to their assessed value, or their real value, or according to their respective frontage on the highways, the law would have been valid. That is to say, that if Congress had prescribed any one of several rules to govern the jury in this matter, the law would have been valid, although by no possibility could they all be just; but that if the law designates a body of men who are to determine these matters after hearing everybody in interest, the Constitution of the United States is violated.

But the fact is that, while the courts, both Federal and State, have uniformly upheld the power of the legislature to fix the taxing district and the rule of apportionment, they have done so reluctantly, and with many protests against the injustice necessarily growing out of the exercise of such an arbitrary power. The idea that the power thus grudgingly yielded by the courts *must* be exercised—that the legislature has no power to give to the parties interested in such proceedings as these, and before their rights are determined the right to be heard before a selected tribunal—seems to us not to be justified by anything to be found in the Constitution or in the authorities.

In Cooley on Taxation, p. 448, it is said, in discussing the methods of apportionment of special assessments for local improvements, that "there are two such methods in common use—one, an assessment by assessors or commissioners, who

are to make a levy in proportion to the benefits according to their opinion, and the other an assessment by some definite standard fixed by the law itself, such as frontage, quantity, or value," and the learned author adds, what seems to be very clear, that "the former of these two methods is the more equal and the more just."

Judge Cooley goes on to say in the same connection that where benefits are assessed, the taxing district may be fixed in two different ways, one by the act of the legislature, or by ordinance of the municipal authorities, and the other by assessors or commissioners, to whose judgment the whole matter may be submitted.

In Spencer *vs.* Merchant, 125 U. S., 356, this court, while holding that if the legislature determines what land is benefited its conclusion is binding on the courts, distinctly says that the legislature "may, if it sees fit, commit the ascertaining of either or both of these facts [the amount of the assessment and the class of lands benefited] to the judgment of commissioners."

In Lent *vs.* Tillson, 140 U. S., 316, 319, a California statute was sustained which provided for an assessment to meet the expenses of widening a street in San Francisco and directed that the assessments should be made by a board of commissioners created by the act. This board was directed "to embody in a written report a description of the subdivisions or lots of land included in the districts designated in section 3 of the act, and to set against each lot or subdivision the amount in which, *according to the judgment of the board*, such lot will be benefited by reason of the widening of the street relatively to the benefits accruing to other lots of land within the designated districts." Here, it will be seen, that while the taxing district was fixed by law, no rule of apportionment was prescribed—the officers who made the assessment being left as to that matter to the exercise of their own judgment and discretion.

In Paulsen *v.* Portland, 149 U. S., 30, 32, an Oregon statute was sustained which provided for assessments for the cost of laying a sewer. This act also fixed the taxing district, but

left it to "three disinterested persons" appointed by the city council "to estimate the proportionate share of the cost of such sewer or drain to be assessed to the several owners of property benefited thereby."

In Doyle *vs.* Austen, 47 Cal., 353, the taxing district was fixed by law, but what land within that district was benefited, and by what rule of apportionment it was to be decided, were left to the board of public works. It was a case of opening a new street in a city.

In Bigelow *vs.* Chicago, 90 Ill., 52, an act of the legislature of Illinois was sustained which left it to assessors to fix the taxing district and to distribute the assessment among the various parcels of land within that district. This was the case of widening an existing street. The work was done in sections. The commissioners as to each section confined the assessment to the lots in that section, and the court to which under the law their work was submitted for confirmation held their action in this regard conclusive.

In the State of New York, by a law applicable apparently to all the cities of the State, a board of assessors is to determine what property is benefited by local improvements and the rule of apportionment. (See People *vs.* Gilon, 126 N. Y., 152.)

In Hoyt *vs.* East Saginaw, 19 Mich., 44 (in which the opinion was delivered by Chief Justice Cooley), the court held that a taxing district must be established; that the question is one which can only be properly and intelligently decided on personal inspection, so that the legislature is obviously not the proper authority to pass upon it; that the proper course is to refer it to some local tribunal; and that when that tribunal is the city council, which has fixed the taxing district and referred it to impartial commissioners to fix the rule of apportionment in that district, no objection can be made to the law.

In Guild *vs.* Chicago, 82 Ill., 477, an ordinance was sustained which provided for opening and extending Dearborn street in the city of Chicago, although it was left entirely to

the commissioners to fix both the taxing district and the rule of apportionment.

In Ferguson *vs.* Stamford, 60 Conn., 438, the town of Stamford had caused certain sewers to be laid under an act passed by the Connecticut legislature which gave the city authorities power to do the work and have part of the costs assessed upon the property benefited. The town authorities left to three commissioners the determination of what property was benefited and how much—the taxing district and the rule of apportionment. These commissioners were appointed by a judge holding one of the state courts. The only objection made to the proceeding was that the town authorities should themselves have made the apportionment, but the ordinance was sustained.

In extension of Hancock street, 18 Pa. St., 27, a Pennsylvania statute authorized "viewers" to ascertain the cost of opening a street in Pittsburg, and to assess that cost on property "in the vicinity of said extension." The Supreme Court of Pennsylvania held that the word "vicinity" had no definite meaning, and that it was for the viewers to determine both the taxing district and the rule of apportionment. But the law was sustained.

A strong case in this connection is State *vs.* Ramsey County, 33 Minn., 310. In that case, as in the Pittsburg case above referred to, the cost [of filling, grading and opening a street] was to be assessed by assessors upon property benefited in the "vicinity" of the improvement. The assessors distributed the cost of the work, according to their own ideas of justice, over a large territory, and the Supreme Court of Minnesota sustained their finding.

A recent case in the Court of Appeals of New York grew out of an assessment that had been made upon certain land in Buffalo belonging to the Lehigh Valley Railway Company on account of expenses incurred by the city in dredging Buffalo river. The case was first heard at a special term of the Supreme Court of New York before Judge Green, who held that the assessment was properly made by certain

assessors and not by the common council of Buffalo. These assessors fixed the taxing district and were restrained by no rule, except that they were to assess the land which they found to be benefited according to the benefits. In his opinion sustaining the assessment as a whole, Judge Green cites a great many cases in New York where the fixing of the taxing district was left to subordinate officers. On appeal the general term affirmed the decision of the special term, adopting and filing as its own Judge Green's opinion delivered at the special term. (See People ex rel. Lehigh Valley Railway Co. *vs.* City of Buffalo, 36 N. Y., Supp., 191.) On a further appeal the Court of Appeals affirmed the decision below. That court also practically adopted the opinion of Judge Green, and held as to fixing the taxing district, that it was competent for the legislature to prescribe the public agency to which this should have been committed; that it could have imposed that duty upon the common council, or on a board of commissioners or on assessors, and that as in the particular case before the court the parties interested had had an opportunity to be heard on the question whether their property was benefited, or as to whether the assessors erred in fixing the assessment district, they had no right to complain. (People ex rel. Lehigh Valley Railway Co. *vs.* City of Buffalo, 147 N. Y., 675.)

In another recent case which came before the Supreme Court of Wisconsin the action was to set aside certain assessments for local improvements. The board of public works of a city had made the assessment upon certain property according to the front-foot rule. The objection was made that this was not according to benefits, as the law required. The court says:

"The former charter had constituted the frontage upon the improvement as the district upon which the benefits were to be assessed. The new charter formed no assessment district, but declared the cost of the improvement to be 'chargeable to the lots and parcels of land benefited thereby.' The purpose of this change is manifest. It is fair and just that each parcel of property benefited by the improvement shall

be made to bear its proportionate share of the burden. It is a matter of common knowledge that property lying in the vicinity of such improvements often derives important benefits from them, although not fronting upon or directly contiguous to them. There necessarily devolved upon the board of public works the duty to ascertain and determine what parcels of land were or would be benefited by the improvement—in effect, to determine the assessment district."

(Hayes *vs.* Douglas County, 65 N. W., Rep. 482).

We might multiply such citations as these to an indefinite extent. The later reports of the decisions of the various State courts in this country are full of cases arising under such statutes as this, where no question has been made as to its being competent for the legislature to leave to subordinate officers the fixing of both the taxing district and the rule of apportionment. These subordinate officers go by various names—commissioners, assessors, viewers, etc. It is fast becoming not an exceptional thing, but the usual and common method of procedure in these cases to leave to a body of men, by whatever name called, selected or appointed for the purpose, the determination of all questions relating to the boundaries of the territory to which the benefits extend, and the apportionment among the several parcels benefited of the amount to be assessed. In no other way can there be even a fair approximation to justice in such proceedings. Take, for instance, the present case. When this law was passed the "map of section One" had not been prepared. No one could tell in advance what subdivisions would be changed or in what way. A method of forming the taxing district that would seem just in one subdivision might prove to be oppressive in another. A rule of apportionment that would equally and properly distribute the burden in one case might be ruinous in every other. Obviously, the only reasonable course to pursue was to commit the determination of these questions in each case to the commissioners—miscalled in the law "the jury"—who were to make the assessment.

The only authority cited by Mr. Justice Cox on this subject in his opinion is State *vs.* Hudson Co. Ave. Commissioners, 37 N. J. L., 12, from the opinion in which case he quotes as follows—the italics being his:

"A legislative act of taxation, in order to be legal and effectual, must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burden. This is as essential as the designation of the amount to be raised; and not only the sum required must be stated and the property out of which it is to be made designated, but *also some certain standard of assessment must be established.* No act of *taxation can omit any of these components.*"

This case was heard and decided in the Supreme Court of New Jersey—not the court of last resort in that State. It grew out of an act which authorized the laying out and opening of a new road across Hudson County, and which provided that certain commissioners should assess part of the cost on land within two thousand feet of the middle of the road, and the remainder on property in the county generally. As to the part the public was to pay the act provided that it shall be raised by a tax on "all lands in the county of Hudson, and on goods and chattels therein owned by residents thereof. The proportion of such tax to be raised on the lands, goods and chattels in any township or ward of any city or town shall be determined by said commissioners."

It was this latter clause of the law which was held to render it void. No objection was made to the statute on the ground that as to the special assessment it was left to the commissioners to fix absolutely the rule of apportionment, and practically the taxing district, since they were not required to assess all the lands within the two thousand foot limit but were simply prohibited from going beyond it.

The opinion was delivered by Chief Justice Brasley, and the part of it which immediately precedes the words quoted by Mr. Justice Cox is as follows:

"But from what I have said I think it must be upon careful consideration conceded that a power unchecked, except by

the obligations of fairness and a reasonable discretion, is vested in this body of persons to distribute this tax according to its judgment of what is just and right among the various townships in this county. Holding this opinion, it seems to me necessarily to result that this act cannot be enforced. The reason of this conclusion is that the legislature has transferred to the commissioners a part of the law-making power.''

It is quite clear that the learned justice who laid so much stress upon this New Jersey case was misled as to the point decided.

The fact is that no State has gone further than New Jersey in the direction we ask this court to go. It has become practically the universal rule in that State to leave to the local subordinate officials not only the fixing of the taxing district and the rule of apportionment, but also the proportion of the cost of the work which shall be paid by the municipality and by the property benefited respectively. We refer to a few cases in the Court of Errors and Appeals of that State illustrating this.

By virtue of several acts of the legislature of New Jersey, commissioners appointed by the Court of Common Pleas of Hudson County were authorized to open and improve certain highways in that county. The commissioners were to assess the cost upon the lands in the county which they might find to be benefited, and were restricted by no rule or provision either as to the taxing district or as to the rule of apportionment, except that no assessment was to be made upon any lands lying north of a line designated in one of the acts. It was objected that this method of making an assessment was unconstitutional. But the court held the proceeding valid, saying:

''Of the objections made by the other prosecutors, two only are material:

'' 'First. That the legislation under which the assessments were made does not provide a constitutional method of assessment.

* * * * * * *

"'The act of 1869 requires the costs and expenses "to be assessed upon and paid by the lands and real estate benefited in proportion to benefits received." The act of 1874 provides for the assessment of the costs, charges, and expenses upon "all the lands and real estate which, in the opinion of the commissioners, or a majority of them, shall be benefited * * * in proportion to the benefit received." This legislative scheme is perfect. (Village of Passaic *vs.* State, 8 Vroom 538.) If it were not, it is made so in the strictest sense by the third section of the act of 1875, which expressly prohibits an assessment on any lot or parcel of land in excess of the amount the same is benefited. The argument that the addition of the words "in the opinion of the commissioners" to the designation of the lands to be assessed avoids the whole provision, as being a delegation of legislative power, is too technical to be sound. In every case where the area of assessment is unlimited, or is restricted to prescribed limits, the lands upon which the burden may lawfully be laid must necessarily be ascertained by the judgment or opinion of commissioners; otherwise, the mode of assessment would be invalid within the principle of the Agens case.'"

State, Freeholders of Hudson, pros., *vs.* Road Commissioners, 41 N. J. L., 87, 88.

The question of the validity of the laws involved in the case just referred to came before the same court the second time, and they were again sustained. (See 42 N. J. L., 608.)

In State *vs.* City of Elizabeth, 41 N. J. L., 152, the following parts of the charter of the city were involved:

"SEC. 101. That in order to provide for the payment of costs, damages, and expenses of laying out and opening, altering, widening, or straightening any street, road, highway, or alley within said city, the city council shall ascertain the whole amount of such costs, damages, and expenses, and shall cause to be made a just and equitable assessment thereof upon the owners of all the lands and real estate benefited thereby, in proportion as nearly as may be to the advantage each shall be deemed to acquire."

* * * * * * *

"SEC. 102. That the city council shall appoint five disinterested freeholders of said city, residing as near by as may be in different wards, commissioners to make any such assessment."

In a proceeding to vacate an assessment for the cost of opening a new street under these provisions, the court said:

"Three reasons are alleged for setting aside the assessment for opening Humboldt avenue, brought up in this case:

"'*First*. That the sections of the charter under which the assessment was made are unconstitutional, because they direct the assessment to be levied upon the owners of all the lands and real estate benefited, in proportion, as nearly as may be, to the advantage each shall be deemed to acquire. (Pamph. L., 1863, p. 109, sec. 1.) This provision, it is contended, is not equivalent to one for an assessment in proportion to the benefits received. But I think it is. The benefits can be ascertained only by an exercise of judgment, and hence the idea conveyed by the words "benefits received" is more fully expressed in the phrase "benefits which each lot shall be adjudged to receive," and of this the charter is a mere paraphrase.'"

In a case involving a similar clause in the charter of Rahway, New Jersey, the Court of Errors and Appeals was asked to vacate an assessment on the ground that the commissioners had arbitrarily adopted the front-foot rule.

The commissioners certified to the court that they had personally examined the locality and determined in making the assessment "what lands in the city of Rahway were peculiarly benefited; and that they assessed all lands so benefited in proportion to the actual benefits received by each lot or parcel of land, and they assessed no lot or parcel of land more than the amount of benefits received." The court (which in this class of cases in New Jersey is authorized to pass upon questions of fact as well as of law) found from the evidence that the commissioners had made the assessment according to the front-foot rule, because they had determined that the several parcels of land concerned were benefited *in*

proportion to their frontage on the street improved and refused to disturb their finding.

In a still later case in New Jersey, Jolliff vs. Newark, 48 N. J. L., 109, a similar statute was again sustained, the court saying that "the area of special benefit is so largely a matter of opinion that the judgment of the commissioners on that subject must stand unless very convincing evidence be adduced against it."

It has been objected, however, to section 15 of the act under consideration—and Chief Justice Alvey concurs in this view—that even if Congress has the power to delegate the fixing of the taxing district and the rule of apportionment to "commissioners" it has not done so. This objection seems to rest entirely upon the name given by the law to the persons who are to make the assessment. Throughout the act of March 2, 1893, they are called a "jury." It seems to be conceded that if the law had appointed or had authorized the court, or some branch of the executive department of the Government, to appoint a "board of commissioners" to fix the taxing district, this objection could not have been made. It is submitted, however, that this is not a question of verbiage but of substance. The name by which the persons who are to make the assessment are designated as a body can certainly not affect the question of the constitutionality of the proceeding.

If it be competent for Congress to authorize the President, or the Secretary of War, or the District Commissioners, after due notice to the parties concerned, to either fix the taxing district or appoint a board of commissioners to do it, it cannot be illegal to have such commissioners appointed by the court; nor if it be legal for the court to appoint a board of commissioners with power to fix the taxing district, can it be unconstitutional for the court to designate a body of men with precisely similar powers and call it a jury.

In this connection great stress is laid upon the amount of the assessment upon some of the lots in the Denison and Leighton subdivision.

The record does not contain the instructions given by the court to the jury in this case, but in his opinion Mr. Justice Cox states that he had instructed the jury to confine the assessment for benefits in respect of the damages in any subdivision to the land in that subdivision. He states that he is satisfied that this was an error. (Rec. in 631 and 632, pp. 37, 38.)

It is conceded, we think, by all the counsel in this case on both sides that there is nothing in the law to indicate that it was the intention of Congress that only the land in a subdivision should be charged with the one-half of the assessment for the damages incurred in making changes in that subdivision. That was a matter exclusively for the jury. It is one of those cases in which the discretion of the jury could be interfered with by the court only on a motion for a new trial, and when they had made some palpable mistake. And if the jury had been permitted to use their own judgment in this matter, they would doubtless have found that land lying on Sixteenth street on both sides of the Denison and Leighton subdivision, and other land in the vicinity, will be benefited as much as, or more than, the land in the subdivision itself by the opening of that great avenue.

But even if the law had expressly provided that the assessment should be confined to the land in the subdivision affected, and this assessment had been made in pursuance of such a provision, it would not be a valid objection to the law, however disproportionate to the real extent of the benefit conferred the assessment might seem to be. That the laying out of these highways and the condemnation of the land required for them in existing subdivisions—thus giving to the land-owners an immediate right of way over the land condemned—*is* a benefit, we think has already been shown in discussing the question of deduction for benefits. (See pages ——— of this brief.)

As to the supposed disproportion between the extent of the benefits and the amount of the assessment there is room for much difference of opinion on that subject. In respect of some of the subdivisions—as, for instance, the one known as

Ingleside, which is involved in cases Nos. 631, 632—we think it quite apparent that the benefits equal, if they do not exceed, the damages.

But since there is or may be a benefit to land in the vicinity of a new highway condemned and established under the act of March 2, 1893, the courts, we submit, will not inquire whether there is any disproportion between the amount of the assessment and the benefits. That is a matter which rests entirely with Congress. In this jurisdiction the Congress of the United States has in this respect all the powers which the State legislatures have in the several States.

Loughborough *vs.* Blake, 5 Wheat., 317;
Welsh *vs.* Cook, 97 U. S., 541;
Willard *vs.* Presbury, 14 Wall., 680;
Mattingly *vs.* Dist. of Col., 97 U. S., 687;
Gibbons *vs.* Dist. of Col., 116 U. S., 404.

The only limitation upon the power of Congress in this District in relation to taxation is that contained in the fifth amendment that no person shall be deprived of his property without due process of law. The fourteenth amendment places the same restriction upon the States, so that the decisions of this court hereinbelow referred to, in which the effect of this provision as to the States is considered, are applicable here.

The argument for the landowners in this case is, in substance, that the changes made in existing subdivisions either by widening existing highways or laying out new ones through them are not a benefit to the people in those subdivisions or in that vicinity, but are for the benefit of the entire public, and that the cost thereof should be paid either by the District of Columbia or by the United States, or by both. But this court has uniformly held in this class of cases that where the legislature decides that the expenses shall be paid, in whole or in part, by local assessments, the courts can not review the action of the legislature in that regard, and even when the legislature assesses the whole

cost of the work upon a portion only of the real estate been efited there is no remedy in the courts.

Thus in County of Mobile *vs.* Kimball, 102 U. S., 691, an act of the legislature of Alabama was considered which authorized certain improvements in the river, bay, and harbor of Mobile, and authorized the issuance of bonds of Mobile County to the extent of one million dollars to pay for the work. Assuming that this may have imposed upon one county the expense of an improvement which was for the benefit of the whole State, this court held the act valid, and Mr. Justice Field, in delivering the unanimous opinion of the court, said :

"The objection to the act here raised is different from that taken in the State court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expense of the improvement which was to benefit the whole State among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people, and must be obtained through a

change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

In Spencer *vs.* Merchant, 125 U. S., 356, an act of the legislature of New York had been passed which provided that the whole expense of laying out or extending Atlantic avenue in the city of Brooklyn should be assessed upon the lands lying within three hundred feet on either side of the avenue which, in the judgment of commissioners to be appointed by the court, should be benefited by opening or extending the avenue. An assessment made under this law having been held void by the Court of Appeals because there was no notice to the landowners before the assessment was made, the legislature by a subsequent act directed a reassessment to be made upon the same lands of a sum sufficient to reimburse the State the amount due it by reason of the cancellation of certain of the assessments in consequence of the decision of the Court of Appeals. The question involved in the case when it reached this court was as to the constitutionality of the law providing for a reassessment. Mr. Justice Gray, delivering the opinion of the majority of the court, said:

"When the determination of the lands to be benefited is entrusted to commissioneers, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

"In determining what lands are benefited by the improvement, the legislature may avail itself of such information as

it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.

"In section 4 of the statute of 1869, the assessment under which was held void in Stuart *vs.* Palmer, 74 N. Y., 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within three hundred feet on either side of the street, were actually benefited, was delegated to commissioners.

"But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon, and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled."

In Charlotte, etc., R'w'y Co. *vs.* Gibbes, 142 U. S., 386, this court had under consideration a South Carolina statute which required the salaries and expenses of the State railroad commission to be borne by the several corporations owning or operating railroads within the State. It was contended that this was calling upon the corporations assessed to pay what was a proper charge upon the treasury of the State, and that in this way they were deprived of their property without due process of law and denied the equal protection of the law. In reply to the argument that the law

compelled individuals to pay what was for the public benefit, Mr. Justice Field, who delivered the opinion of the court, said:

"There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening, or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. (Morgan *vs.* Louisiana, 118 U. S., 455, 466.) So the expense of a cumpulsory examination of a railroad engineer to ascertain whether he is free from color-blindness has been held to be properly chargeable against the railroad company. (Nashville, Chattanooga and St. Louis Railway *vs.* Alabama, 128 U. S., 96, 101.) So, where work is done in a particular county for the benefit of the public the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in County of Mobile *vs.* Kimball, 102 U. S., 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interest of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the State, or be apportioned between them, is matter of legislative direction."

In Illinois Central R. R. Co. *vs.* Decatur, 147 U. S., 190, the question was whether a statute exempting the railroad company from taxation relieved it from the obligation to pay

special assessments imposed to pay the cost of local improvements and charged upon contiguous property upon the theory that it was benefited thereby. In that case Mr. Justice Brewer delivered the opinion of the court. He says, quoting in part from Cooley on Taxation, p. 416:

"Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made, *and it may appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application can not demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice.*

"These distinctions have been recognized and stated by the courts of almost every State in the Union, and a collection of the cases may be found in any of the leading text-books on taxation."

Even when it appears that Congress has exercised the taxing power not to produce revenue but for some ulterior purpose, the courts cannot interfere. Thus, in the familiar instance of the tax of ten per cent. levied in 1866 upon the circulation of State banks, this court said, in Veazie *vs.* Fenow, 8 Wall, 543, 548:

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to to the legislative department of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

It should be noted that none of the justices below took the view of this matter which is now urged by the land-owners. Neither Justice Cox nor Chief Justice Alvey mentions this objection at all. Justice Shepard, in delivering the majority opinion in the Court of Appeals as to section 15, says: "It is fair, liberal, and regular. * * * The benefits are not apportioned by any arbitrary rule of frontage, area, or neighborhood; but are to be ascertained by a jury under the direction and supervision of a competent court with the same right of appeal as in other cases."

As to the objection that section 15 does not require notice to be give to those whose lands are or may be assessed, so that they may have an opportunity to be heard, we submit:

1. That as this objection was not made in either of these cases in the courts below, it is too late to make it here.

2 That the law does require notice. Section 8 directs a public notice to everybody interested, and whenever practicable personal notice also. The condemnation of the land and the assessment of benefits are all by the same jury, and constitute one proceeding.

3. Even if this were not so, notice is required by the provision in section 15 that "the proceedings of the court and jury in making assessments for benefits under this section shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages." As notice is required in the assessment of damages, this would make it necessary in the assessment for benefits if there be two distinct

proceedings. As to this Paulsen *vs.* Portland, 149 U. S., 30, 37, 38, is precisely in point, and is conclusive.

4. The record shows that public notice was given in these cases. (See Rec. in 631, 632, 634, 635, 636; Rec. in 633, 634.) Personal service was also had, but the record does not disclose this for the reason that every owner of every lot upon which an assessment was made was in court in person or by counsel. This clearly appears in the record in 633 and 634, at pages 46, 47, and is shown by necessary implication at pages 10 to 13 in the record in 631 and 632 by the fact that a motion was made to dismiss the proceedings signed by counsel on behalf of "all the owners of the pieces or parcels of ground described in the plat attached to and made part of the petition in this case."

III.

As to the effect upon the remainder of the act if sections 11 *and* 15, *or either of them, is held to be unconstitutional.*

As to this, all the justices of the Court of Appeals held that the invalidity of sections 11 and 15 does not affect the remainder of the law. At the threshold of this inquiry the question arises whether the conclusion of that court on this point is reviewable here at all. That court holds that upon striking out these two sections as invalid it sufficiently appears that the intention of Congress was that the rest of the act should stand. This is not a question as to the constitutionality of the law or any part of it. The act of January 21, 1896, which gives an appeal to this court in these cases, expressly provides:

"Said court shall determine only the questions of constitutionality involved in the case."

Although this consideration seems to us conclusive, we proceed to submit our views as to the intention of Congress in this matter.

Upon examination of the opinion of Mr. Justice Cox, it will be found that he disposed of this question—the most important one in the case—without either argument or reference to any authority.

We have personally examined all the cases cited in the various text-books on eminent domain, as well as by Dillon on Municipal Corporations and by Cooley in his work on Constitutional Limitations as sustaining the contention that benefits may not be deducted. We have found that in most of those cases the question arose, not upon any statutory provision directing the deduction of benefits, but under some general provision providing for the ascertaining of compensation to be paid for the land taken for public use. Of course, the question we are now considering could arise only in those cases in which there is held to be a conflict between a constitutional provision providing for compensation and a statute providing that in ascertaining that compensation benefits to the part of a tract not taken may be deducted from the value of the part taken. Of such cases we have found ten. In only one of these did the court seem to think it necessary to even consider the proposition that because the benefits could not be deducted the whole act should be declared invalid. This exceptional case is Brown *vs.* Beatty, 34 Miss., 241, 247, and in that case the court expressly held that the rest of the act was valid and should be enforced. In the other nine cases the court seemed to take for granted that the rest of the act was valid, and either remanded the case for further proceedings or took some other action indicating that the statute was to be enforced as though the clause relating to the deduction of benefits was not to be found therein. These cases are:

Isom *vs.* Miss. Cent. R. R. Co., 36 Miss., 300–314.

Woodfolk *vs.* R. R. Co., 2d Swan, 422.

Paducah & Memphis R. R. Co. *vs.* Stovall *et al.*, 12 Heisk., 1.

The Mayor, etc., of Atlanta *vs.* R. R. Co., 53 Ga., 120–123.

Jacob *vs.* City of Louisville, 9 Dana, 114.

Elizabethtown, etc., R. R. Co. *vs.* Helm's Heirs, 8 Bush, 681.

Buffalo, etc., R. R. Co. *vs.* Ferris, 26 Texas, 588.

Carpenter *vs.* Demmings, 77 Ill., 250.
Henderson, etc., R. R. Co. *vs.* Dickerson, 17 B. and Mon., 173–180.

We confidently aver that in all the numerous discussions of this question of deduction of benefits which are to be found in the reports it is impossible to find a single case, except the one now before the court, in which it has been seriously maintained that because the benefits may not be deducted as provided by the statute authorizing the condemnation, the whole proceeding falls to the ground.

And in this case it is to be noticed that there is a strong reason why the act should stand, although the benefits cannot be allowed, which applies to none of the above cases in which the body of the statute was sustained notwithstanding the invalidity of the clause relating to benefits. In those cases the law under consideration authorized some public improvement to be made and the legislature contemplated that a part of the expense should be met by the deduction of benefits. There would in such cases be at least some ground for arguing that it might be thought that if the legislature had known that no part of the expense could have been met in that way, it would not have authorized the work to be done at all. But in the case at bar the act provides merely for what is in substance an inquiry into the cost of the proposed work and directs that the result of that inquiry shall be submitted to Congress for its action. What possible reason can be suggested for refusing to make the inquiry and submit the result of it to Congress because the courts find it impossible to consider one particular item in the account?

Another difference between this statute and most others of a similar character should be observed, and that is that section 11 confers express power upon the court to direct that the jury shall state the damages and the benefits separately. It must be presumed that Congress was aware of the fact that the right to deduct benefits is an unsettled question in the federal courts and the necessary inference is that this provision was inserted so that if the appellate tribunals should find that the benefits could not be deducted at all,

it would not be necessary to put the parties to the expense and delay of a new trial. What possible purpose could be subserved by stating the damages and the benefits separately except that the verdict might be confirmed as to damages alone?

In the case of Monongahela Navigation Co. *vs.* U. S., 148 U. S., 312, which is much relied upon here by counsel for the landowners, this court, as we have already seen, held invalid that part of the act involved in that case which directed that in the condemnation proceedings the Navigation Company should be allowed no compensation for its franchise to collect tolls. According to the argument made here by counsel on the other side, this should have rendered the whole act invalid, because it might be said that Congress would not have authorized the condemnation proceedings if it had known that the franchise in question would have to be paid for as well as the tangible property taken. But in that case it seems not to have occurred to either counsel or the court that any such result would ensue, and the court, as a matter of course, remanded the case for a new trial and further proceedings.

The same argument applies to section 15 with additional force. All the objections made to that section are those which may be readily cured by an amendatory act. No question has been made by any of the counsel in this case, much less by the courts below, that it is competent for Congress to provide for an assessment of one-half the cost of this work upon the land benefited. Therefore, if Congress should see fit to accept the awards when they are made, and make an appropriation, it can at the same time remedy the defects, if any there be, in the section under consideration. It is not to be supposed that in enacting this legislation for the extension of the plan of the city of Washington over the District Congress meant that the preliminary estimate should not be submitted to it because of the failure of any such matter of detail as this. The first five sections of the act refer to the preparation and recording of the maps, and everything in the history of the case and everything in the language of

the law justifies the conclusion that Congress intended that at all events the maps when filed should stand as a permanent plan for the extension of the city of Washington over the remainder of the District. This is made perfectly plain by section 18, which provides in substance that if Congress shall not, after the time therein limited, make an appropriation to pay the award in any particular case, the proceedings in that case shall be void. Congress may as to some subdivisions make the appropriation, and as to the others it may refuse to do so. It may decline to appropriate for any of these subdivisions. In any event the map will stand and he opening of the streets in the subdivisions as to which no immediate appropriation shall be made will be left upon the same footing as the opening of highways outside of them.

There is ample provision in the laws of this District for the opening of highways laid down on the map of section One without the aid of any part of the act of March 2, 1893, relating to condemnation proceedings. It has been shown above in the statement of the case (page of this brief) that the laws which have become sections 252 to 265 of the Revised Statutes of the District of Columbia have governed such condemnation proceedings in this District for many years. These sections have recently been practically reenacted by Congress. By section 3 of an act of Congress approved August 30, 1890, certain special condemnation proceedings were authorized for obtaining land upon which to make an extension of the Government Printing Office. That section concluded in these words:

"And hereafter in all cases of the taking of property in the District of Columbia for public use, whether herein, heretofore, or hereafter authorized, the foregoing provisions, as it respects the application by the proper officers to the Supreme Court of the District and the proceedings therein, shall be as in the foregoing provisions declared." (26 Stat., 413.)

No doubt it was intended that this clause should apply only to proceedings for the condemnation of land for public buildings, but as it was broad enough to apply to all condemnation proceedings whatever a question arose as to whether

it had not repealed the old "roads law" of the District. Thereupon, by an act approved August 7, 1894, it was further provided:

"That section 3 of the act approved August 30, 1890, * * * shall not be construed to apply to the condemnation of land for public highways, nor to repeal Chapter 11 of the Revised Statutes of the United States relating to the District of Coumbia in regard to public highways, roads, and bridges." (28 Stat., 251.)

If Congress had meant that its failure to adopt the conclusions of the juries in these cases should be fatal to the whole scheme, it would have been easy to say so. And since Congress has expressly manifested its intention that the maps should stand even if the condemnation proceedings, including the assessment, should fail altogether by reason of the work of the juries not being satisfactory to Congress, it would seem to follow that it was the intention that the map should stand if those proceedings should fail, in whole or in part, from any other cause.

Aside from all this, we submit that in no case where a public improvement is directed to be made will the proceeding fail because in the same act there is a provision, which cannot be enforced, for an assessment upon private property to reimburse, in whole or in part, the expense of the work. The doing of the work and the paying for it are one thing. The assessment for it is another thing. The two things may be, and frequently are, in different acts. That they happen to be joined in the same act is no reason why one cannot stand without the other. No better example of this could be suggested than the act of September 27, 1890 (26 Stat., 492), under which the Rock Creek Park in this District was established. By that statute land was to be condemned for the park. The first five sections referred to the condemnation proceedings proper. The 6th section provided for an assessment of the whole or a part of the expenses "upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park as nearly as may be in proportion to the benefits result-

ing to said real estate." The question of the constitutionality of this act came before this court, and it was sustained (Shoemaker *vs.* U. S., 147 U. S., 282). When the case was here no assessment had been made, as under the law the assessment could not be made until the condemnation proceedings were concluded. But after the condemnation proceedings had been affirmed here, the Rock Creek Park commissioners undertook to make an assessment. Thereupon a bill in equity was filed to enjoin them from proceeding upon the ground that a local assessment in such a case was unconstitutional, and also because the language of the act relating to the assessment was so vague and uncertain that it could not be enforced. In the Special Term of the Supreme Court of the District of Columbia section 6 of the act relating to the assessment was held void for uncertainty, and on appeal the Court of Appeals affirmed the decree below. (Craighill *vs.* Van Riswick, 24 Wash. Law Reporter, 177.) From the decree of the Court of Appeals an appeal has been taken to this court, where the case is now pending.

If the contention made by counsel for the landowners in this case be sustained, that when an act provides for condemnation of land for public purposes and authorizes an assessment for the whole or part of the cost the whole act fails if the provision for an assessment be void, then the courts below were concluded in the Rock Creek Park case by the decision of this court that the provisions of the law relating to the condemnation proper were constitutional and valid. This court will be concluded on that subject when the case is reached here. Or, on the other hand, supposing the contention made in the case at bar to be correct, if this court should agree with the courts below in the Rock Creek Park case that the assessment cannot be made, then the whole of the Rock Creek Park act is void, and all the proceedings that have been had under it ought to be set aside. No one will seriously contend that such a conclusion would follow, yet that case is in this regard precisely like the act of March 2, 1893, now under consideration.

IV.

The preparation and recording of the map of Section One, under the Act of March 2, 1893, do not constitute a taking of any of the land included therein within the meaning of the fifth amendment to the Constitution.

In the opinion of Mr. Justice Cox it is said: "It is unnecessary to decide whether the recording of the map amounts to a taking" (Rec. in 631-2, p. 36). In another part of his opinion, however, he refers to the case of State *vs.* Hudson County Ave. Commissionors, 37 N. J. L., 12, and says:

"Had the full effect of the act of March, 1893, been appreciated before any step was taken to carry it into execution, this case would have been an authority for arresting in the preliminary proceeding the recording of the map by certiorari or injunction. No such question, however, is before me, and I refer to it only as an additional feature of the situation showing the importance of some legislative revision of the law."

The learned justice was probably unaware of the fact that a bill was filed by some of the landowners interested to enjoin the preliminary proceeding of recording the map; that the application for a preliminary injunction had been fully argued before Mr. Justice McComas, then holding the Equity Court; and that in a full and carefully prepared opinion he had decided that that part of the act of March 2, 1893, which refers to the preparation and recording of the map, is valid and had denied the injunction.

In the Court of Appeals the majority opinion, which was delivered by Mr. Justice Shepard, holds that the recording of the maps does not amount to a taking of the land "in the sense that it interferes with the enjoyment thereof by the owners to an injurious extent beyond the power of Congress without a provision for compensation" (Rec. 631-2, p. 49). In the dissenting opinion this matter is not mentioned.

That the legislature has the right to provide for the future extension of a city on a harmonious plan prepared in advance without requiring it to go on and at once condemn and pay

for all the land covered by the highways laid down on the plan seems to us to be clear. But in view of the importance of the question in this case we have examined the statutes and decisions of the courts on the subject at some length.

In the case of Prosser *vs.* Northern Pacific R. R. Co., 152 U. S., 59–64, this court sustained an act of the legislature of the State of Washington which authorized the board of harbor line commissioners of that State to establish "harbor lines and lines of water-ways in front of the city and in the harbor of Tacoma" over the wharves and lands of the railroad company. The company filed a bill to enjoin the recording of the plat after the harbor commissioners had completed it. Mr. Justice Gray, in delivering the opinion of this court, said :

"There can be no doubt that a State may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters not inconsistent with any legislation of Congress, limiting the building of wharves and other structures upon lands not already built upon. (Yesler *vs.* Wash. Harbor Commissioners, 146 U. S., 646; Weber *vs.* Harbor Commissioners, 18 Wall., 57 ; Atlee *vs.* Packet Co., 21 Wall., 389, 393; Commonwealth *vs.* Alger, 7 Cush., 53 ; People *vs.* New York & Staten Island Ferry, 68 N. Y., 71; State *vs.* Sargent, 45 Conn., 358.) Such harbor lines, in order to fulfill their purpose, must be established according to a general system, having in view not only the convenience of approach to the water from the shore, but the effect of the daily ebb and flow of the tide in keeping clear or filling up the harbor. The establishment of general harbor lines, of itself, takes or injures no one's property, and can not, consistently with the interests of the public, or with the principles of equity, be restrained by injunction. If the State of Washington, or the city of Tacoma, or any public officer or private individual shall hereafter take active measures, or bring suit, so as to injure or affect the supposed title or rights of the plaintiff, or its use and enjoyment thereof, the dismis-

sal of this bill will not stand in the way or a full and fair trial of the title and rights claimed."

The Rock Creek Park act referred to in the above-mentioned case of Shoemaker *vs.* U. S. (147 U. S., 282), contained this clause:

"Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, *and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses and the title thereof vested in the United States*, subject to the payment of just compensation to be determined by said commission and approved by the President of the United States."

Referring to the contention of counsel for the landowners in that case, that they should have been allowed interest from the time of the filing of the map, Mr. Justice Shiras said: "The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map."

The map of Baltimore, known as "Poppleton's Map," was prepared nearly eighty years ago under the Maryland act of 1817, Ch. 148. It laid out streets that were not to be opened or condemned until needed. The law was sustained by the Court of Appeals of Maryland, but a clause forbidding the erection of buildings on the projected highways was held void.

Moale *vs.* Baltimore, 5 Md. 322.
Stewart *vs.* Baltimore, 7 Md., 508.

An act of the legislature of Pennsylvania, approved June 16, 1836 (Pamph. L., 1835-6, p. 750), authorized the preparation and recording of maps extending the plan of the city of Pittsburg over the surrounding territory. After prescribing that the map shall be prepared in sections and submitted

to a local court for approval, the statute proceeds to say that the court "after such determination shall direct the said map or plan, with such alteration as shall be made, to be recorded, and thenceforth the said map or plan shall be taken as a general plan for the said district for the purposes in the act contained, and the streets, lanes, and alleys so approved shall forever after be deemed, adjudged, and taken as public highways."

This last clause did not mean that the public should at once have a right of way over the highways, because in a subsequent part of the law a provision was made for the payment of compensation to the owners when the streets should be opened to travel. When a section map, prepared under this law, was ready to be recorded, the court in which the matter was heard, in the first instance refused to admit it to record, holding the law to be unconstitutional (on what ground does not appear). On appeal, the Supreme Court of Pennsylvania reversed the judgment, saying, among other things:

"It is only when the streets, lanes, alleys, and public squares shall come to be admitted in this case into the city as a part thereof, and be *opened* under the authority of the same in the manner prescribed by the act, that the land so appropriated can be said to be taken or regarded as taken for public use; for until then the owners thereof continue not only to hold the same interest in them, but likewise to have the right to enjoy and use them in the same manner that they did previously. * * *

"But it has been objected in this case that it was not competent for the legislature to pass an act in anticipation of a future increase of the population of the city with a view to accommodate such increased population by laying off a district of the country, or lands adjacent to the city, and directing a survey and location of streets, lanes, alleys, and public squares to be made in it, so that if the population should increase in such degree as to render it expedient to make it a part of the city at some distant day it should be added thereto as such. It would be matter of great regret, I think, if it

were the case, that the legislature could not exercise such a power. But it is clear that they are not limited by the Constitution in this respect; and it is equally clear that the public might, and, indeed, frequently would, be subjected to great inconvenience if such a power did not exist and could not be exercised by them in prospect of the rapidly progressive and increasing improvement and population of the State, so as to accommodate and meet the exigencies of the public at a future day. This was done under the authority of an act of the legislature of New York, passed in 1816, as appears from the case in the matter of opening Furman street, in the city of Brooklyn (17 Wend., 649), whereby a survey was directed to be made of Brooklyn, which was then but a village, extending the plan of it far beyond its population at that time, together with a map thereof, exhibiting the streets, roads, and alleys to be permanently laid out. The survey and map were made in 1818 by trustees appointed for that purpose, exhibiting the street then in question, among others, as laid out, which, however, was not to be opened until the future advance of the population and business of the town should render it necessary; and accordingly no step was taken for opening it under the provisions of the act until 1835, when the town had increased greatly in size and population, and had become a city; but no one seems to have thought the act or the proceedings under it unconstitutional. And the court even went so far in the case as to hold that the owners of buildings in Brooklyn, erected on the site of the streets, as designated on the map of the village, were not entitled to compensation for the destruction of such buildings by the opening of the streets, although the orders for opening the same was not made until seventeen years after the approval and adoption of the map."

In re Dist. of City of Pittsburg, 2 W. & S., pp. 320–325.

In a case entitled Forbes' Appeal, 70 Pa. St., 135–6, the same act was again held constitutional by the Supreme Court

of Pennsylvania. In that case that court "went so far" as to hold that a clause in the law was valid, which provided that the owner of any building which should be erected on the line of one of the highways laid down upon the map after the map was recorded, when condemnation proceedings should be subsequently instituted, should not be entitled to compensation for the building.

In a case entitled *In re* Chestnut Street, 118 Pa. St., 599, an act of the Pennsylvania legislature was held to be constitutional which provided for the widening of Chestnut street in the city of Philadelphia. The law in substance enacted that whenever any new building was to be erected on Chestnut street it would be set back a certain number of feet from the former street line—the owner being entitled to compensation at that time for the strip so given over to the use of the public. It was contended that this was a cloud upon the title of the owners of the land, which entitled them to compensation at once. The entire opinion of the court in this case is exceedingly interesting and pertinent in consideration of the case now before this court.

Under an act of the Pennsylvania legislature approved June 6, 1871 (Session Laws 1871, p. 1353), and subsequent amendatory acts, plans for the extension of the city of Philadelphia over a large territory adjoining Philadelphia have been prepared and recorded. In the plats in common use in Philadelphia these projected streets are indicated by dotted lines, the streets really opened being shown by continuous lines. In this way the authorities have provided for the prospective growth of that city for the next fifty years. A discussion of these laws will be found in Trickett's Pennsylvania Road Laws, Ch. XL., p. 456 et seq.

The upper part of New York city—from about the neighborhood of Washington Square to the Harlem River—was laid out into streets and avenues nearly ninety years ago under an act of the legislature of New York, passed in 1807 ( ). The act in question is a very long one. In substance it directed the preparation and recording of a sys-

tem of streets over all the upper part of Manhattan Island, and provided that when streets were opened in the future they should be opened according to that plan and not otherwise. We do not find that any question as to the validity of this law was ever raised in the courts of New York.

The city of New York in time extended beyond the Harlem River, and a number of subdivisions were made therein which were not in conformity with the plan of New York city nor with each other. The situation was very much like that with which Congress had to deal in this District when it passed the acts of 1888 and 1893. By an act of the legislature of New York (Laws of 1890, Ch. 545), and certain unimportant amendatory acts, the appointment of commissioners was authorized to provide a street system for the large region north of the Harlem River, now known as the Twenty-third and Twenty-fourth wards of New York city. Authority was given to change existing subdivisions. These maps are now nearly completed and copies of them are in possession of the Commissioners of the District of Columbia. These maps show where the existing streets are located and where the new streets are to go when opened. There is no provision made for compensation to the owner, and no suggestion of his being entitled to any until formal condemnation proceedings take place, when the highways are from time to time needed and opened to public use.

In Foster *vs.* Scott, 136 N. Y., 575, 577, the purchaser of a lot in New York city had refused to carry out his contract on the ground that there was an incumbrance upon the land. This incumbrance consisted of a projected highway laid down on a map prepared by authority of the city in accordance with law—the highway being a part of the street extension system of the city of New York. The New York statute contained a provision that if after the recording of the map any building should be erected upon a highway laid down on it, and condemnation proceedings should have to be resorted to thereafter, the owner should not be entitled to compensation for the building. The Court of Appeals of New York held

the purchaser to his contract upon the ground that the restriction as to platting was void, and that the map itself constituted no incumbrance or cloud upon the title.

Another act of the New York legislature, approved April 12, 1816 (Laws of N. Y., Vol. 4, p. 90 a), contains similar provisions for laying out the "village" of Brooklyn far beyond the then existing needs of that community. This act was considered by the Supreme Court of New York in a case entitled In the matter of Furman street, 17 Wend., 653—the case referred to in 2 W. & S., 320, *supra*. In that case the court sustained the law and said:

"The act of 1816 was prospective in its character. It did not provide for the present wants of the inhabitants by directing streets to be immediately opened, but had regard to the probable advance of the town in population and business and the public avenues which might be required at a future period. A survey was directed of the streets 'to be permanently laid out;' and the map was to be kept by the clerk of the corporation, subject to public inspection, 'in order that no resident may plead ignorance of the permanent plan to be adopted for opening, laying out, leveling, and regulating the streets of the said village.' The survey and map were not for all purposes a present opening or laying out of new avenues, but a plan for excavating such works in future, and the map was to be kept for inspection to the end that all residents might know what was anticipated and govern themselves accordingly."

Brooklyn, too, in time outgrew the limits which had been set for it. Several villages, known as "Newlots," "Flatbush," "Flatlands," etc., grew up in the neighborhood. By an act of the legislature of New York, approved May 7, 1869 (Laws of 1869, Ch. 670), commissioners were appointed to provide one system of streets for the territory surrounding the city of Brooklyn, including these settlements. The act directed that the commissioners should "plan and lay out streets, roads, and avenues in the said towns conforming to the avenues and streets and plan of the city of Brooklyn as now terminated at the city line as nearly

as practicable and judicious. * * * After the establishment or adoption of such permanent plan no streets or avenues shall be laid out in said towns, or either of them, except in accordance with said plan so adopted, and all streets or avenues afterwards opened, widened, or improved shall be made to conform to such permanent plan and the lines thereof." The official map of the city of Brooklyn in common use in that city shows in dotted lines the streets which have been platted under this legislation, and although the system has been in operation for nearly thirty years the validity of the law seems never to have been doubted by anybody.

By an act of the legislature of Massachusetts (Ch. 323 of the acts of 1891, as amended by Ch. 418 of the acts of 1892), a board of survey was created for the purpose of preparing in sections, and filing, maps extending the street plan of the city of Boston over the contiguous territory. The work of this board is entirely separate from that of condemning and opening the streets. It has been engaged in these operations ever since 1891, and it has since that time made annual reports showing the progress of its work, with accompanying maps, which reports and maps are published and are accessible to everybody. If the validity of this legislation has been questioned in the courts of Massachusetts we are not advised of it.

In Ohio, by Ch. XII of the Municipal Code Coppeck's Ohio Mun. Code, secs. 2626 to 2639), provision is made for the making of similar maps by every municipal corporation in the State, and for their being filed in the offices of the proper county recorder and city engineer. The act provides:

"And no streets or alleys, except those laid down on said plan, shall subsequently be in any way used as public streets or alleys by the municipal corporation; nor shall any of the public funds be expended in the improvement or repair of streets and alleys subsequently laid out and not on said plat."

To what extent this act has been carried out in Ohio we are not advised, except as to the city of Cincinnati; but in that city, since as far back at least as 1875, the "Platting

Commission" has prepared and recorded maps extending the plan of that city in accordance with this statute.

We might go on indefinitely with these citations, but we deem it unnecessary. If there be any valid objection to the act of March 2, 1893, as authorizing the laying out of streets which may not be condemned and opened for many years, the same objection would apply to the act of 1888, and to any possible provision that could be made regulating the making and filing of subdivisions of land in the county of Washington. The act of 1888 provides that no subdivision shall be admitted to record unless made in conformity with the general plan of the city of Washington. If this should be held to mean (as was unsuccessfully contended in Ross *vs.* Goodfellow, 7 App. Cas., D. C., 1) that the streets and avenues of the city must be projected in straight lines, then the effect is the same as it would be if the Commissioners in this case in the exercise of their discretion had extended the streets in that way. If, on the other hand, as the Court of Appeals held, the Commissioners are to exercise some discretion in projecting the city streets over the surrounding territory and may deflect them when advisable, the owners of land beyond the boundary will have a worse "cloud" over their property than is created by the act of 1893, for while they would know that the streets were to be extended over their land, they would be unable to ascertain their precise location without making a subdivision and dedicating them to the public. In truth, this so-called "cloud" exists whether there be any legislation on this subject or not. The city must grow over this territory; as it grows the streets must be extended; and every man in the county holds his land subject to the right of the Government when the public convenience requires the opening of highways through it to create such highways. If there be any injury to him at all the injury is greater when he knows that the streets must come and does not know where they are to go than when he is advised, in advance, of their exact location, so that he may govern himself accordingly. And he has this further advantage when there is a

comprehensive plan prepared in advance—he knows that when he chooses to subdivide his land, subdivisions thereafter made will conform to it. The benefit to him is in kind, if not in degree, precisely what the benefit to the owners of the land covered by the original plan of the city of Washington was from that plan. He knows that instead of being in one of a number of misfitting villages having no relation with the capital except that they are in the same vicinity, his land will become as much a part of the city as the squares which lie south of the boundary. And if he wishes to erect his house where he will not be disturbed in the future by condemnation proceedings, he has but to call upon a surveyor to mark the line where the street laid down on the map is to go and build his walls accordingly.

V.

The Act of March 2, 1893, is not void because it does no provide for the payment of the damages when they shall be ascertained.

It hardly seems necessary to argue that Congress may cause condemnation proceedings to be instituted under the right of eminent domain without binding the United States to pay for the land involved, whatever it may cost; but as counsel representing some of the landowners interested in this proceeding have made this objection, we will briefly advert to it. The objection was not sustained either by Mr. Justice Cox or by any of the justices of the Court of Appeals. The decisions of this court seem to leave no support for this contention.

The legislature of Maryland, by an act approved February 18, 1828, authorized the Baltimore & Susquehanna Railroad Company to construct a railroad from Baltimore to the Susquehanna River, and contained the usual provisions for the condemnation of land needed for the road. Under this statute certain land was condemned and the damages assessed at $500. In 1837 the inquisition was ratified and confirmed by the court in proceedings under the law. In 1841 the legislature of Maryland passed a statute setting aside the in-

quisition and directing a new one. After hearing the parties the proper court made an order setting aside the inquisition, and thereupon a writ of error was sued out of this court, the plaintiff in error contending here that the proceedings under the original act had created a contract between the plaintiff in error and the railroad company, the obligation of which the act of 1841 impaired. But the later act was sustained by this court, Mr. Justice Daniel delivering the opinion, saying:

"It can hardly be questioned that without acceptance by the acts and in the mode prescribed the company were not bound; that if they had been dissatisfied with the estimate placed upon the land or could have procured a more eligible site for the location of their road, they would have been at liberty before such acceptance wholly to renounce the inquisition." (Baltimore & Susquehanna R. R. Co. *vs.* Nesbit, 10 How., 395, 432.)

In the subsequent case in this court of Garrison *vs.* City of New York, 21 Wall., 204, the facts were essentially like those in the case just referred to. Mr. Justice Field, in delivering the opinion of this court in that case, said:

"The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State and is necessarily under her control. It is her duty to see that the estimates are just, not merely to the individual whose property is taken, but to the public who is to pay for it. * * * Until the property is actually taken and the compensation is made or provided the power of the State over the matter is not ended."

In the Rock Creek Park case (Shoemaker *vs.* U. S., 147 U. S., 282) Congress appropriated the sum of $1,200,000 to pay for the land to be taken for the park. The commissioners appointed under the law prepared and filed a map showing the land which they had decided should be taken for the park. After the condemnation proceedings were concluded, however, it was found that the land laid down on the map

would cost more than the amount of the appropriation. Thereupon the commissioners abandoned a part of the land, and thus reduced the cost within the limits of the appropriation. The landowners in that case were represented by able counsel, and they contested the proceedings to take their land at every step, but it seems not to have been suggested that the act was void, because the preparation and filing of the map created a cloud on the land embraced within it, while it did not require the Government to take it all.

And the Rock Creek Park act, which was under consideration in the case of Shoemaker *vs.* U. S., expressly provided that the title of the land laid down on the map prepared by the Commissioners should vest in the United States as soon as the map was filed. The act of March 2, 1893, contains no provision of this character, the owners of land embraced in the highways laid down on the maps prepared under that law having as free use of their land after the map is filed as before. This law does not even contain the restriction found in so many of these statutes, and sustained by the courts in some instances, that no compensation shall be allowed for any buildings erected on the lines of the highways after the filing of the map.

The contention of counsel for the landowners in this regard, if sustained, would require that whenever Congress institutes proceedings to condemn land for public use in the District of Columbia or elsewhere, it must provide that the cost of the land condemned, as fixed in the proceedings, shall be paid at all events without regard to the amount. As a matter of fact unlimited appropriations of this kind are never made by Congress. Usually an appropriation is made in a sum which Congress thinks will be sufficient. This was the case under the act in which the site for the Congressional Library was condemned and in the act providing for the condemnation of the site for the city post office on Pennsylvania avenue. The fact that the expense of the proceedings is limited in this way does not bind or in any way affect the courts in dealing with the question of just compensation to the landowners (United States *vs.* Gettsburg Electric Ry.,

160 U. S., 668), and when, as usually turns out to be the case, it is found that the appropriation is insufficient, it is for Congress to elect whether it will make the additional appropriation and take the land or abandon the proceedings. As a matter of fact, we think no instance can be found in which the additional appropriation has not been made when needed.

It must, therefore, be held, we submit, that it is competent for Congress to provide for condemnation proceedings in proper cases and to reserve to itself a reasonable time after the conclusion of the proceedings to determine whether it will make an appropriation for the amount found to be due or abandon the proceedings. That is all that has been done, in this instance, and the conclusion reached by all the justices of the Court of Appeals on this subject, should we think, be sustained.

VI.

The provision found in section 2 of the Act of 1893, *which directs that after any section map shall have been recorded the Commissioners shall not improve, repair, or assume any responsibility in regard to any abandoned highway is not invalid, nor if invalid does it make the whole act void.*

Careful provision is made in the act of 1893 for any injury that may result to the landowners from the abandonment of existing highways. In section 6 it is said "That within thirty days after any such map shall have been recorded as aforesaid, which shall alter any highway or highways in any then existing subdivision in the area included in such map, *or which shall dispense with any highway or highways, or any part thereof*, in any such subdivision," etc. So in section 15 it is said, "The same jury which shall assess the damages caused by the opening of any highways or reservation, or part thereof, *or by the abandonment of an existing highway or part thereof*, shall ascertain and determine what property is thereby benefited," etc. The clause in section 2 which makes it unlawful after a section map is recorded for the Commissioners to improve or assume any responsibility in regard to abandoned highways, must be construed in con-

nection with these other provisions of the law, and also with the last clause of the fifth amendment to the Constitution. So construed it means that the highways are not "abandoned" until compensation shall have been made to those injured thereby.

On this point it is only necessary to refer to Garrison *vs.* City of New York, 21 Wall., 196, 204, and Shoemaker *vs.* U. S., 147 U. S., 282, 321. In the former case it was held that a declaration in a statute authorizing condemnation proceedings that the title will vest at a particular time must be construed in subordination to the constitutional provision requiring the payment of compensation, or provision for its payment, to precede the taking, or at least to be concurrent with it. And in the Rock Creek Park case, although the statute, as we have seen, expressly declared that this title should vest in the United States as soon as the map was filed, this court, in discussing the claim of the landowners that they should have been allowed interest from that time, said, "The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map." And certainly if an express provision that the title of the landowner shall be divested when the proceedings are instituted is to be held to mean that it shall be divested when the proceedings are at an end and compensation made therein, there is no difficulty in applying the same rule to a provision like the one in question. It does not say that the highway shall be deemed to be abandoned from the time the map is filed, but merely that after that time the Commissioners shall not improve, etc., any abandoned highway. The abandonment is not complete till the condemnation proceedings are at an end.

Moreover it has been held that the State has the right to abandon a highway at any time without being under any obligation to make compensation to those whose lands abut thereon, because the abutting owners are not deprived of their private right of way over the land covered by the street.

McGee's Appeal, 114 Pa. St., 476.

Barr *vs.* Oskaloosa, 45 Iowa, 278.

And see Elliott on Roads, page 86 (note 2), and pages 112, 113 (note 1).
Also Morgan *vs.* U. S., 96 U. S., 716

There is no occasion to go so far in this case, but it may be noted that if the contention of counsel on the other side that in proceedings like this the courts are confined strictly to compensation for land actually taken without reference to the effect of the proceedings upon the part of a tract not taken is correct, there will be some difficulty in applying the constitutional provision regarding just compensation to the case of an abandoned highway.

In the city of Washington proper the fee of the streets and avenues is in the General Government (VanNess *vs.* Washington, 4 Pet., 232.) But in highways outside of Washington the fee is in the owners of the adjoining property. The streets in all the subdivisions that have been made of land in the county of Washington have been dedicated by the voluntary action of the owners of the land, who thereby gave to the public a mere right of way over the highways laid down on them. Besides the right which the public thereby acquires, each purchaser of a lot in such a subdivision on well-settled principles acquires a special interest in the streets and has a right to have them kept open for his use—a right of which he will not be deprived by any proceedings under the act of March 3, 1893.

No one will claim that there is any constitutional obligation resting upon Congress to keep in repair any street or other highway in the District. By the organic act of the District the Commissioners are prohibited from making any contract or incurring any obligation except in pursuance of express authority from Congress (act of June 11, 1878, 20 Stat., 102). Ever since that time the Commissioners have been required to submit to Congress annually in detail their estimate of expenditures for street improvements and repairs during each year, and Congress each year makes appropriations for the improvement of the streets on the schedule submitted or some of them. There is also an annual appropriation for general repairs of streets. If Congress, by accident

or design, omits these appropriations, special or general, would the Constitution be violated? As has already been seen, there are over seventy miles of streets in the city of Washington which have remained totally unimproved for about a hundred years. It is in vain, we submit, that counsel assert the unconstitutionality of the provision of this clause in section 2 of the act of March 2, 1893.

If we are correct in the position which we have taken, the judgments below in these cases should be reversed. So far as they determine the value of land actually taken for the highways laid down in the respective subdivisions, or the damages sustained by any landowner either from injury to a part of a tract not taken or from the abandonment of any highway or part thereof, no objection is made to the verdicts of the juries, but it is submitted that there was error in refusing to give effect to that part of the respective verdicts which, where a part of a lot only is taken, ascertains the benefits to the remainder thereof. As to the Ingleside subdivisions, these benefits apply to nearly every lot and amount to $14,239.19 (Rec. in 631 and 632, pp. 15, 18). As to the Denison and Leighton subdivision, they apply to a majority of the lots, and amount to $40,395.40 (Rec. in 633 and 634, pp. 13, 14).

So far as the assessments for benefits is concerned in these two cases, it is agreed on all hands that they cannot stand. The landowners claim, as has been seen, that section 15, under which the assessment is made, is wholly void, and on behalf of the Commissioners it is conceded that an erroneous principle was adopted in confining the assessment to land in the particular subdivision involved. But if, as we think, section 15 is valid and should be enforced, then it will be necessary to recall the juries in these cases to make a new assessment upon proper principles.

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167-548

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Cases No. 631, 632, 633 and 634.

STREET EXTENSION CASES.

Appendix to Brief for District Commissioners.

Act of March 2, 1893, and Amendatory Act of January 21, 1896.

HARTMAN & GADICK, PRS.

APPENDIX.

An Act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia are hereby authorized and directed to prepare a plan for the extension of a permanent system of highways over all that portion of said District not included within the limits of the cities of Washington and Georgetown. Said system shall be made as nearly in conformity with the street plan of the city of Washington as the Commissioners may deem advisable and practicable. The highways provided in such plans shall not in any case be less than ninety feet nor more than one hundred and sixty feet wide, except in cases of existing highways, which may be established of any width not less than their existing width, and not more than one hundred and sixty feet in width.

SEC. 2. That the said plans shall be prepared from time to time in sections, each of which shall cover such an area as the Commissioners may deem advisable to include therein, and it shall be the duty of the Commissioners in preparing such plan by sections, as far as may be practicable, to select first such areas as are covered by existing suburban subdivisions not in conformity with the general plan of the city of Washington. The Commissioners in making such plans shall adopt and conform to any then existing subdivisions which shall have been made in compliance with the provisions of the act of Congress approved August twenty-seventh, eighteen hundred and eighty-eight, entitled "An act to regulate the subdivision of land within the District of Columbia," or which shall, in the opinion of the Commissioners, conform to the general plan of the city of Washington: *Provided, however*, That no place or street extending no farther than from one principal street to another, which has been opened under the direction of the Commissioners, or in conformity with any subdivision approved by them prior to August twenty-

seventh, eighteen hundred and eighty-eight, and recorded, and which is now paved with asphalt or other sheet pavement, shall be altered, affected, or interfered with by any plan adopted or anything done under or by virtue of this act. Whenever the plan of any such section shall have been adopted by the Commissioners they shall cause a map of the same to be made showing the boundaries and dimensions of and number of square feet in the streets, avenues, and roads established by them therein; the boundaries and dimensions of and number of square feet in each, if any, of the then existing highways in the area covered by such map, and the boundaries and dimensions of and number of square feet in each lot of any then existing subdivision owned by private persons; and containing such explanations as shall be necessary to a complete understanding of such map. In making such maps the Commissioners are further authorized to lay out at the intersections of the principal avenues and streets thereof circles or other reservations corresponding in number and dimensions with those now existing at such intersections in the city of Washington. A copy of such map, duly certified by the Commissioners, shall be delivered to a commission hereby created, composed of the Secretary of War, the Secretary of the Interior, and the Chief of Engineers, for the time being, who shall make such alterations, if any, therein, as they shall deem advisable, keeping in view the intention and provisions of this act, and the necessity of harmonizing as far as possible the public convenience with economy of expenditure; and if such commission shall see fit, they may cause to be made a new map in place of the one submitted to them. When such commission, or a majority thereof, shall have come to a final determination in the matter, they shall approve in writing the map which they shall adopt, and shall deliver it to said Commissioners of the District of Columbia, and the same shall at once be filed and recorded in the office of the surveyor of the District of Columbia, and after any such map shall have been so recorded no further subdivision of any land included therein shall be admitted to record in the

office of the surveyor of said District, or in the office of the recorder of deeds thereof, unless the same be first approved by the Commissioners and be in conformity to such map. Nor shall it be lawful when any such map shall have been so recorded for the Commissioners of the District of Columbia, or any other officer or person representing the United States or the District of Columbia, to thereafter improve, repair, or assume any responsibility in regard to any abandoned highway within the area covered by such map, or to accept, improve, repair, or assume any responsibilty in regard to any highway that any owner of land in such area shall thereafter attempt to lay out or establish, unless such landowner shall first have submitted to the Commissioners a plat of such proposed highway and the Commissioners shall have found the same to be in conformity to such map, and shall have approved such plat and cause it to be recorded in the office of said suveyor. In order to enable the said Commissioners to proceed speedily and efficiently to carry out the purposes of this act, they are hereby authorized to appoint two civilian assistants to the Engineer Commissioner, who, with such Engineer Commissioner, shall, under the direction of the Commissioners, have immediate charge of the work to be done under this act: *Provided, however*, That the appointment, term of office, and compensation of such civilian assistants shall be subject to the approval of the commission hereinbefore provided for, consisting of the Secretary of War, the Secretary of the Interior, and the Chief of the Engineers, or of a majority of them.

SEC. 3. That when any such map shall have been recorded as aforesaid in the office of the surveyor of the District it shall be lawful for the owner of any land included within such map to adopt the subdivision thereby made by a reference thereto, and to this section in any deed or will which he shall thereafter make, and when any deed or will containing any such reference shall have been made and recorded in the proper office it shall have the same effect as though the grantor or grantors in such deed or the maker of

such will had made such subdivision and recorded the same in compliance with law.

SEC. 4. That for the purpose of making surveys for such plans and maps the Commissioners and their agents and employees necessarily engaged in making such surveys are authorized to enter upon any lands through or on which any projected highway or reservation may run or lie.

SEC. 5. That the Commissioners of the District of Columbia are authorized to name all streets, avenues, alleys, and reservations laid out or adopted under the provisions of this act.

SEC. 6. That within thirty days after any such map shall have been recorded as aforesaid, which shall alter any highway or highways in any then existing subdivision in the area included in such map, or which shall dispense with any highway or highways, or any part thereof, in any such subdivision, the Commissioners of the District of Columbia shall make application to the Supreme Court of the District of Columbia, holding a special term as a district court of the United States, by written petition, praying the condemnation of a permanent right of way for the public over all the land lying within the limits of such subdivision not already owned by the United States or the District of Columbia, or dedicated to public use as a highway, which shall be included within the highways or reservations laid out by the Commissioners and indicated on such map. Upon the filing of such petition the said court in special term shall proceed to condemn a permanent right of way for the public over said land in the manner hereinafter provided.

SEC. 7. That as to any highway or highways or part of any highway or highways laid down upon any such map which shall not lie within the limits of any existing subdivision the Commissioners at any time thereafter, when in their judgment the public convenience shall require the opening of the same or of any part thereof, may make application as aforesaid to the Supreme Court of the District of Columbia, holding a special term as aforesaid, for the condemnation and opening of the same; and said court in

special term as aforesaid shall thereupon proceed in the manner hereinafter provided to condemn a permanent right of way for the public over all the land not already owned by the United States or the District of Columbia, or dedicated to public use as a highway, included within the highway or highways or part of a highway or highways, described in such application: *Provided*, That in such case the court after public notice shall have been given as hereinafter directed, shall first hear evidence as to whether the public convenience does in fact require the immediate opening of the highway or highways or part of any higway or highways described in such application, and shall determine that question on the evidence submitted to it; and if the court shall as to any part of the land sought to be condemned decide such question in the negative it shall proceed no further as to such part at that time. And if the court, after such notice and hearing shall determine that the public convenience does not in fact require the immediate opening of any highway or highways or any part thereof described in such application, no further proceedings shall be had under such application.

SEC. 8. That when any application shall have been filed in said court in special term under the preceding sections of this act said court in special term shall cause public notice of not less than thirty days to be given of such application, in such manner as shall be prescribed by a general rule by said court in general term, which notice shall warn all persons having any interest in the proceedings to attend the court at a day to be named in said notice, and to continue in attendance until the court shall have made a final order in the premises. Said court in special term, after such notice shall have been given, shall take no further step until the time thereby limited shall have expired, and shall afford all parties in interest a reasonable opportunity to be heard during the proceedings. In addition to such public notice said court in special term, whenever it shall be practicable to do so, shall cause a similar notice to be served by the marshal of the District of Columbia, or his deputies, upon

each of the owners of the land sought to be condemned; and shall also cause notice to be given to the attorney of the United States for the District of Columbia.

SEC. 9. That when the object of any such application to said court shall be in whole or in part to rectify or change an existing subdivision the court, immediately after the expiration of the time limited in such notice, shall proceed without delay to make the required condemnation, so far as it shall relate to any land within such subdivision, and as to any land not lying within the limits of an existing subdivision which is sought to be rectified or changed the court shall proceed in like manner only after it shall have determined as hereinbefore provided that the public convenience requires the condemnation, and then only to the extent which the public convenience shall require.

SEC. 10. That when any right of way is to be condemned under this act said court in special term shall cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal, and shall administer to the jury an oath or affirmation that they will, without favor or partiality to anyone, to the best of their judgment, determine such questions as may be submitted to them by the court during the proceedings. The court, before accepting the jury, shall hear any objections that may be made to any member thereof, and shall have full power to decide on all such objections and to excuse any juror and to cause any vacancies in the jury to be filled. When the jury shall have been organized the court and the jury shall hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia or on behalf of the United States or by any person having any interest in the proceedings, and the proceedings shall be conducted as nearly as may be as civil cases triable by jury are now conducted in said District, but the order of proof shall be in the discretion of the court. Upon the motion of any party in interest the court may direct the jury to view the premises under

consideration, under such regulations as the court may prescribe. When the hearing is concluded the jury, or a majority thereof, shall render a written verdict in such form as may be prescribed or submitted to the jury by the court, which verdict shall be signed by the jurors, or by a majority of them, and filed in the court. The court shall have power to set aside such verdict when satisfied that the same is unjust or unreasonable. One jury may be sworn and one trial had as to all or any of the parcels of land involved in the proceeding, at the discretion of the court, and where the jury shall have rendered a verdict as to more than one parcel or land the court may set aside the verdict as to one or more parcels and confirm it as to the others. When the verdict of the jury, in whole or in part, shall have been so set aside a new jury shall be summoned and the proceedings continued until the court shall have confirmed a verdict as to all the land involved in the proceeding.

SEC. 11. That where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding the jury in assessing the damages therefor shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately.

SEC. 12. That no trial under this act shall fail by reason of the death or disability of any juror occurring during the proceedings, but the hearing shall proceed with the remaining jurors: *Provided*, That no verdict shall be valid unless concurred in by a majority of a complete jury.

SEC. 13. That no evidence shall be offered or received by the jury as to the persons who will be entitled to receive the compensation that may be awarded as to any parcel of land. If any question shall arise as to whether any person claiming a right to be heard is in fact interested in the proceedings, the court shall hear and determine the question in a summary way, and in cases of doubt shall permit the party

to be heard. The verdict of the jury shall state as to each parcel of land involved in the proceeding only the amount of compensation, less the benefits, if any, which it shall award in respect thereof, and shall not contain any finding as to the ownership of the land or the persons entitled to the compensation.

SEC. 14. That each of said jurors shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services.

SEC. 15. That the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be one-half assessed against the land benefited thereby and the other half shall be charged up to the revenues of the District of Columbia; that one-half of the amount awarded by said court as damage for each highway or reservation or part thereof, condemned and established under this act, shall be charged upon the lands benefited by the laying out and opening of such highway or reservation or part thereof and the remainder of such amount shall be charged to the revenues of the District of Columbia. The same jury which shall assess the damages caused by the opening of any highways or reservation or part thereof, or by the abandonment of an existing highway or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the whole of said one-half of the damages: *Provided*, That in making such assessment for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, make due allowance for the amount, if any, which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract. The proceedings of the court and the jury in making assessments for benefits under this section shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages, and the verdict of the jury making an assessment under this section as to any parcel of

land shall not be conclusive until the same shall have been confirmed by the court. When confirmed by the court the assessment so made shall be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia have been collected since February twenty-first, eighteen hundred and seventy-one, and shall be payable in five equal annual installments, with interest at the rate of four per centum per annum from the date of the confirmation of the assessment by the court. That no expense for the improvement of any street, circle, reservation, or avenue laid out under the provisions of this act, outside the cities of Washington and Georgetown, shall be chargeable to the Treasury of the United States, but such expense shall be paid solely out of the revenues of the District of Columbia.

SEC. 16. That when said court shall have assessed the damages to be paid as to any parcel of land the use of which shall have been condemned, or which shall have been injured by the abandonment of a previously existing highway, and there shall be no controversy as to the persons who are entitled to receive the same or as to the distribution of the same among them, said court shall decree such payment to be made, and upon presentation of a duly certified copy of such decree to the Treasurer of the United States he shall report the same to Congress for consideration and action and shall make such payment to the person or persons appearing by such decree to be entitled thereto as Congress may provide; but where any such controversy shall exist or where there shall be any doubt as to the proper disposition of the compensation awarded, the court shall order that the damages assessed by it involved in such controversy or doubt shall be paid into the registry of the court, and upon the presentation of a duly certified copy of such order to the Treasurer of the United States he shall, when the necessary money is appropriated, pay the amount therein mentioned to the clerk of said court; and the claims of the respective parties thereto shall thereupon be heard and decided by the

court as in interpleader suits in equity, under such general rules as may be prescribed by said court in general term.

SEC. 17. That said court, in special term as aforesaid, may certify to said court in general term for decision there in the first instance any question of law that shall arise during any proceeding in said court in special term under this act. Any party aggrieved by the final order or decree of said court in special term fixing the amount of damages or the assessment for benefits as to any parcel of land may take an appeal therefrom to said court in general term, and shall be entitled to a bill of exceptions as in civil cases, triable by jury in said court, and said court in general term may affirm, reverse, or modify the order or decree appealed from: *Provided*, That said court in general term shall consider only questions of law arising on such appeal. From a final decree of said court in special term under this act distributing the damages among contending claimants any party aggrieved may in like manner take an appeal to the court in general term, which in such cases shall consider both questions of law and of fact. Any appeal under this act shall be taken within twenty days after the making of the final order or decree appealed from, and not afterwards, and shall be subject to existing laws and rules of court regulating appeals to said court in general term. Cases arising under this act shall have precedence over all other business in said court in special term, and shall have precedence in said court in general term over all other cases except criminal cases, and the decision of said court in general term upon any question arising under this act shall be final.

SEC. 18. That whenever any final decree shall have been made by said court under the provisions of this act for the payment of the damages to the parties or into the registry of the court and when the money has been appropriated and paid the Commissioners shall be entitled to take immediate possession of the parcel of land in regard to which said order of payment shall have been made, and the court shall enforce such right of possession by proper order and by process addressed to the marshal of the United States for the Dis-

trict of Columbia. In case the court shall enter judgment of condemnation in any case, and appropriation is not made by Congress for the payment of such award within the period of six months, Congress being in session for that time after such award or for the period of six months after the meeting of the next session of Congress, the proceedings shall be void, and the land shall revert to the owners.

SEC. 19. That the Commissioners of the District of Columbia shall include in their annual report a full statement of their action under this act, and shall submit annual estimates of the expenditures necessary to be made under its provisions, as other estimates are submitted.

Approved, March 2, 1893.

An act to amend an act entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," approved March second, eighteen hundred and ninety-three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section seventeen of the act approved March second, eighteen hundred and ninety-three, entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," be, and the same is hereby, amended so as to read as follows:

Sec. 17. That said court in special term may certify to the court of appeals of the District of Columbia for decision there, in the first instance, any question of law that shall arise during any proceedings in said court in special term under this act. Any party aggrieved by the final order or decree of said court in special term fixing the amount of damages, or the assessment for benefits as to any parcel of land, may take an appeal to said court of appeals, and shall be entitled to a bill of exceptions as in civil cases triable by jury, and said court of appeals may affirm, reverse or modify the order or decree appealed from: Provided, That said Court of Appeals shall consider only questions of law arising on such appeal. From a final judgment of said court in special term under this act, distributing the damages

among contending claimants, any party aggrieved may in like manner take an appeal to the Court of Appeals, which court in such cases shall consider both questions of law and fact. Any appeal under this act to the Court of Appeals shall be taken within twenty days after the making of the final order or decree appealed from, and not afterwards, and shall be subject to the laws and rules of court regulating appeals to said Court of Appeals. Cases arising under this act shall have precedence in said court over all other cases, except criminal cases, and the decision of said Court of Appeals upon any question arising under this act shall be final: *Provided*, That from any judgment or order of said Court of Appeals involving any question as to the constitutionality of this act or of any part thereof, any party aggrieved may, within thirty days after such judgment or order shall be entered, appeal to the Supreme Court of the United States. Said court shall determine only the questions of constitutionality involved in the case, and shall have power to make such special rules and regulations applying to appeals under this act as may be proper to bring such cases to a speedy hearing and determination.

Approved, January 21, 1896.

167-548

Supreme Court, U. S.
DEC 16 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1896.

No. 631.

CHARLES H. BAUMAN, JOHN H. JOLLY, CHARLES G. SHOEMAKER, ANNIE H. PANGHORN, EDMUND N. WOODRUFF, HERBERT H. KIMBALL, JAMES H. HENSLEY, AND FRANK B. NOYES, APPELLANTS,

vs.

JOHN W. ROSS, GEORGE TRUESDELL, AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No. 632.

JOHN W. ROSS, GEORGE TRUESDELL, AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. BAUMAN, JOHN H. JOLLY, CHARLES G. SHOEMAKER, ANNIE H. PANGHORN, EDMUND N. WOODRUFF, HERBERT H. KIMBALL, JAMES H. HENSLEY, AND FRANK B. NOYES.

No. 633.

BUTLER F. ABBOT, APPELLANT,

vs.

JOHN W. ROSS, GEORGE TRUESDELL, AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No. 634.

JOHN W. ROSS, GEORGE TRUESDELL, AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOT, ET AL.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief for the Appellants in No. 631, the Appellant in No. 633, the Appellees in No. 632, and the Appellee, Butler F. Abbot, in No. 634.

NATHL. WILSON,
CHAPIN BROWN,
ARTHUR H. O'CONNOR,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

CHARLES H. BAUMAN *et als.*, Appellants,
vs.
JOHN W. ROSS *et als.*, Commissioners of the District of Columbia, Appellees.
No. 631.

JOHN W. ROSS *et als.*, Commissioners of the District of Columbia, Appellants,
vs.
CHARLES H. BAUMAN *et als.*, Appellees.
No. 632.

BUTLER F. ABBOT, Appellant,
vs.
JOHN W. ROSS *et als.*, Commissioners of the District of Columbia, Appellees.
No. 633.

JOHN W. ROSS *et als.*, Commissioners of the District of Columbia, Appellants,
vs.
CHARLES H. ARMES, BUTLER F. ABBOT *et als.*, Appellees.
No. 634.

Brief for the Appellants in No. 631, the Appellant in No. 633, the Appellees in No. 632, and the Appellee, Butler F. Abbot, in No. 634.

Statement.

These are appeals and cross-appeals from two decrees of the Court of Appeals of the District of Columbia severally affirming two decrees of the Supreme Court of the District of Columbia, holding a special term as a District Court of the United States, in two separate but similar suits instituted under the provisions of the act of Congress of March 2, 1893, entitled "An act to provide "a permanent system of highways in that part of the "District of Columbia lying outside of cities." (27 Stat., 532.)

The decree, which is the subject of the appeal and cross appeal in Nos. 631 and 632, was entered in a suit begun September 27, 1895, by the filing of a petition by the Commissioners of the District in the Supreme Court of the District of Columbia, holding a special term as a district court of the United States, for the purpose of having condemned a permanent right of way for the public over all the land within the limits of the suburban division known as "*Ingleside Subdivision by Chapin Brown*," as described on the map filed with the petition as Exhibit No. 1. (Rec. in Nos. 633 and 634, pp. 1 to 5.)

The decree, which is the subject of appeal and cross appeal in Nos. 633 and 634, was entered in a suit of like character, begun on the same day by the filing of a pe-

tition by the Commissioners of the District in the same court, for the purpose of having condemned a permanent right of way for the public over all the land within the limits of the suburban subdivision known as "*Denison and Leighton subdivision* of a part of Mt. Pleasant and Pleasant Plains," as described in the map filed with the petition as Exhibit No. 1. (Rec. in Nos. 633 and 634, pp. 1 to 5.)

The Act of Congress under which the proceedings were instituted.

The title of the act approved March 2, 1893, is—

"An act to provide a permanent system of highways "in that part of the District of Columbia lying outside "of cities."

Section 1 authorizes and directs the Commissioners of the District of Columbia—

"to prepare a plan for the extension of a permanent "system of highways over all that portion of said Dis- "trict not included within the limits of the cities of "Washington and Georgetown;"

and directs that the system shall be made—

"as nearly in conformity with the street plan of the city "of Washington, as the Commissioners may deem advis- "able and practicable."

Section 2 provides that—

"said plans shall be prepared, from time to time, in sec- "tions, each of which shall cover such an area as the "Commissioners may deem advisable to include therein."

Whenever a plan of any section shall have been adopted by the Commissioners they are required to—

"cause a map of the same to be made showing the "boundaries and dimensions of and number of square

"feet in the streets, avenues, and roads established by "them therein; the boundaries and dimensions of and "number of square feet in each, if any, of the then "existing highways in the area covered by such map; "and the boundaries and dimensions of and number of "square feet in each lot of any then existing subdivision "owned by private persons."

A copy of the map, so made, certified by the Commissioners, is to be delivered to a Commission composed of the Secretary of War, the Secretary of the Interior, and the Chief of Engineers, who are given authority to make alterations, or to make a new map, and the map approved by them in writing is to be delivered to the Commissioners of the District, and *then at once filed and recorded in the office of the Surveyor of the District of Columbia.*

Section 6 provides that if the map so recorded in the office of the Surveyor *alters any existing subdivision, or shall dispense with any highway or part thereof in any such subdivision*, the Commissioners shall, within thirty days from the time the map is so recorded, make application by written petition to the Supreme Court of the District of Columbia holding a special term as a district court of the United States, praying the condemnation of a permanent right of way for the public over all the land lying within the limits of such subdivision not already owned by the United States or the District of Columbia, and the said court is directed, upon the filing of such petition, to proceed to condemn a permanent right of way for the public over said land.

Section 7 provides that as to any highway or highways or part thereof laid down upon any such map and *not within the* limits of any existing subdivision, the

Commissioners may make like application to the same court when in their judgment the public convenience shall require the opening of the same. In such cases public notice shall be given, and the court shall then proceed to hear evidence, and shall itself determine whether in fact the public convenience does require the immediate opening of the highways described in the application to the court.

Sections 8, 9, and 10 provide for the giving of public notice of the application made by the Commissioners for the condemnation of lands for highways, and for the appearance and hearing of parties having an interest in the proceedings, and for the summoning of a jury "to "determine such questions as may be submitted to them "by the court during the proceedings," and for the rendition of verdicts and the entry of decrees.

The jury is required to render their verdict in such form as may be prescribed or submitted to them by the court.

Sections 11 and 15 provide and prescribe the method by which the entire cost of the system of highways contemplated by the act is to be ultimately defrayed in part by those lot owners whose property may be considered as benefited by the proposed system and legislative purpose, and in part out of the revenues of the District of Columbia. They give rise to the questions to which these appeals chiefly relate, and are as follows:

"SEC. 11. That where the use of a part only of any "parcel or tract of land shall be condemned in such a "proceeding the jury in assessing the damages therefor "shall take into consideration the benefit the purpose "for which it is taken may be to the owner or owners of

"such tract or parcel by enhancing the value of the re-
"mainder of the same, and shall give their verdict accord-
"ingly, and the court may require in such case that the
"damages and the benefits shall be found and stated sepa-
"rately."

"SEC. 15. That the amount awarded by said court as
"damages for each highway or reservation, or part
"thereof, condemned and established under this act,
"shall be one-half assessed against the land benefited
"thereby and the other half shall be charged up to the
"revenues of the District of Columbia; that one-half of
"the amount awarded by said court as damage for each
"highway or reservation or part thereof, condemned and
"established under this act, shall be charged upon the
"lands benefited by the laying out and opening of such
"highway or reservation or part thereof and the re-
"mainder of said amount shall be charged to the reve-
"nues of the District of Columbia. The same jury
"which shall assess the damages caused by the opening of
"any highways or reservation or part thereof, or by the
"abandonment of an existing highway or part thereof,
"shall ascertain and determine what property is thereby
"benefited, and shall assess against each parcel which
"it shall find to be so benefited its proper proportional
"part of the whole of said one half of the damages:
"*Provided*, That in making such assessment for benefits
"the jury shall, as to any tract a part of which shall
"have been taken for such highway or reservation, or
"part thereof, make due allowance for the amount, if
"any, which shall have been deducted from the value
"of the part taken on account of the benefit to the
"remainder of the tract. The proceedings of the court
"and the jury in making assessments for benefits under
"this section shall conform as nearly as is practicable to
"the foregoing provisions of this act relating to the as-
"sessment of damages, and the verdict of the jury mak-
"ing an assessment under this section as to any parcel
"of land shall not be conclusive until the same shall
"have been confirmed by the court. When confirmed
"by the court the assessment so made shall be a lien
"upon the land assessed, and shall be collected as
"special improvement taxes in the District of Columbia

"have been collected since February twenty-first, eigh-
"teen hundred and seventy-one, and shall be payable in
"five equal annual installments, with interest at the rate
"of four per centum per annum from the date of the con-
"firmation of the assessment by the court. That no
"expense for the improvement of any street, circle, reser-
"vation or avenue laid out under the provisions of this
"act, outside the cities of Washington and Georgetown,
"shall be chargeable to the Treasury of the United
"States, but such expense shall be paid solely out of the
"revenues of the District of Columbia."

Section 16 contains the only provision relating to the payment of the compensation that may be found due to the owners of the parcels of land, the use of which shall have been condemned under the proceedings instituted by the Commissioners.

It provides that when the court shall have assessed the damages to be paid to the owners of land and there shall be no controversy as to the persons who are entitled to receive the same the court shall decree such payment to be made—

"*And upon presentation of a duly certified copy of such*
"*decree to the Treasurer of the United States he shall report*
"*the same to Congress for consideration and action and shall*
"*make such payment to the person or persons appearing by*
"*such decree to be entitled thereto as Congress may provide.*"

In controverted cases the money when appropriated is to be paid to the clerk of the court, and the claims thereto are to be heard and determined by the court.

Section 18 provides that possession may be taken of the land the use of which has been condemned in accordance with the terms of the act, only when the damages awarded have been paid; and declares what shall be the effect of the failure of Congress to appropriate

within a specified time the amounts awarded by the court, and is as follows:

"SEC. 18. That whenever any final decree shall have "been made by said court under the provisions of this act "for the payment of the damages to the parties or into the "registry of the court and when the money has been "appropriated and paid the Commissioners shall be en- "titled to take immediate possession of the parcel of land "in regard to which said order of payment shall have "been made, and the court shall enforce such right of "possession by proper order and by process addressed to "the marshal of the United States for the District of "Columbia. In case the court shall enter judgment of "condemnation in any case, and appropriation is not "made by Congress for the payment of such award with- "in the period of six months, Congress being in session "for that time after such award or for the period of six "months after the meeting of the next session of Con- "gress, the proceedings shall be void, and the land shall "revert to the owners."

The pleadings, facts, and verdicts.

The petitions filed by the Commissioners of the District as aforesaid, within the time specified in the act, allege that, in pursuance of the requirements of the act of Congress referred to, they prepared a plan, in sections, for the said extension of a permanent system of highways, and prepared, adopted and certified to the Commission appointed by the act a copy of the map of Section 1 of said plan, and the same having been approved by said Commission was on the 31st of August 1895, filed and recorded in the office of the Surveyor of the District of Columbia. (Rec. in Nos. 631, 632, 633 and 634 pp. 1 to 7.)

The map so prepared, approved, and recorded covers so much of the area of the District of Columbia as is

bounded on the east by North Capitol Street, on the west by Rock Creek, on the north by the boundary line of the District, and on the south by Florida Avenue, and contains the suburban subdivision known as *Ingleside subdivision*, to which the proceedings in cases Nos. 631 and 632 relate, and the suburban subdivision known as *Dennison and Leighton's subdivision*, to which the proceedings in cases Nos. 633 and 634 relate.

The entire map or plan of Section 1 is not in the record, but the record contains a stipulation that the original map shall be considered as having been put in evidence and duly authenticated, and may be referred to on the hearing. (Rec., Nos. 633 and 634, p. 44.)

Due publication having been made, and all persons interested having appeared and filed their answers, reserving objection to the validity of the proceedings, a jury was first impannelled in the case relating to the suburban subdivision known as *Denison and Leighton's subdivision*, and evidence was adduced on behalf of the petitioners and the respondents.

The jury, on the 11th of January, 1896, rendered a verdict in the form prescribed by the court, in which was set forth a description of the parcels through which the lines of the proposed extensions were laid out and marked on the map, the number of square feet in the parcel, the number of square feet taken, the number of square feet not taken, the estimated compensation for the land taken, the compensation for buildings taken, the damages to the remainder of the parcels so in part taken, the *benefits* to the remainder of the parcels in part taken, and the amount due for

compensation and damages less the benefits to those parts of lots that were not taken.

The total amount found by the jury to be due as compensation for lands taken and for damages in respect of the portions not taken of lots in part taken was $245,917.26, and the value of the *benefits* to the remainder of lots in part taken was found to be $40,395.40. The net amount found due as compensation was $205,521.86.

The jury also found that there was due as damages to parcels injured by the abandonment of streets or parts of streets as public highways in respect of designated lots, $7,555.29.

The total amount awarded by the jury as compensation for land taken and as damages caused by the *abandonment* of streets or parts of streets as public highways was $253,472.55. One-half of this amount, viz., $126,736.27, was *assessed* by the jury, in pursuance of the requirements of section 15 of the act, on those pieces or parcels of land in the subdivision which the jury found to be benefited.

The manner in which it was sought to give effect to and execute the provisions of sections 11 and 15 by the jury acting under the instructions of the court will appear on examining the verdict with reference to the first parcel of ground on the schedules attached to and a part of the verdict.

Lot No. 44 is found to contain 7,485 square feet, of which 4,255.3 were taken and 3,229.7 were not taken.

The value of the land taken was found to be $4,893.59, and the benefits to the part of the lot not taken were

$1,614.85, leaving the net amount due for the land taken $3,278.74.

In assessing one-half of the whole amount found due as compensation for property taken and as damages for property injured, the one-half being $126,736.27, as above stated, the jury, under the requirements of section 15, and the instructions of the court, assessed against the 3,229.7 feet of said Lot 44, being that part not taken, the sum of $2,939.02.

If the verdict of the jury were to be carried into effect, and the money paid according to its provisions, the owner of Lot 44, containing 7,485 square feet, valued by the jury at $1.20 per square foot, and worth, therefore, $8,982, would be deprived of 4,255.3 square feet, for which he would receive (estimated benefits being deducted) $3,278.74, and would have remaining 3,229.7 square feet charged with an assessment of, and subject to a lien for, $2,939.02. (Rec. in Nos. 633 and 634, pp. 14–17.)

In respect of lot 61, owned by the appellant in No. 633, Butler F. Abbot, the lot was found to contain 6,517 square feet, of which 4,729 square feet were taken and 1,788 square feet were not taken.

The value of the land taken was found to be $3,073, and the benefits to the part not taken were found to be $536.40, leaving the net amount due for the land taken, $2,537.45.

But there was assessed against the 1,788 square feet not taken, in respect of general benefits, the sum of $1,012, the assessment being nearly equal to the valuation of the 1,788 square feet not taken.

After the jury rendered its verdict in the proceeding relating to *Denison and Leighton's Subdivision* the same jury was sworn in in the cause relating to the *Ingleside Subdivision.*

Similar proceedings were had and a similar verdict was rendered.

The total amount found by the jury to be due as compensation for lands taken was $36,736.73, and the value of the benefits to the remainder of lots in part taken was found to be $14,239.19.

The net amount found due as compensation was $22,497.54.

One-half of the amount found due as compensation, as aforesaid, the estimated value of benefits not being deducted (the one-half being $18,368.36), was assessed by the jury on those parcels or lots of ground in the subdivision which the jury found to be benefited.

On referring to the verdict of the jury and the schedules filed therewith and made part thereof, it will be seen that in many instances the benefits to the parts of lots not taken exactly equal the value of the parts of the lots taken, so that no compensation whatever is found to be due for the parts of lots taken. (Rec. in Nos. 631 and 632, pp. 14 to 22.)

After the verdicts were rendered, as stated, the motion to dismiss the petition, which had been made before the jury was sworn and again after the jury was sworn in the proceeding relating to the *Denison and Leighton subdivision,* having been renewed, the court granted the motion

and February 5, 1896, entered the following order or decree:

"It appearing to the court that the act of Congress "under which this proceeding is instituted is unconsti- "tutional and void for the reasons stated in the opinion "of the court this day filed, it is ordered and adjudged "by the court this 5th day of February, 1896, that the "verdict rendered herein by the jury be, and the same is "hereby, set aside, and that the petition herein be, and "the same is hereby, dismissed." (Rec., Nos. 633 and 634, p. 43.)

Judge Cox's opinion.

The opinion of Justice Cox, filed when the order dismissing the proceeding relating to the Dennison and Leighton subdivision was entered, contains a thorough and careful analysis and exposition of the provisions of the act of March 2, 1893, and especially those of sections 11 and 15.

While acquiescing in the conclusion of eminent commentators that the weight of authority in the *State* courts favors the view that the special benefits to an individual lot of which a part is condemned can properly be set off against or deducted from the amount found due as the value of the land appropriated, and as special damage to the remainder of the tract or parcel, he held that the benefits described in and contemplated by the act of March 2, 1893, were not of a kind nor of such a character as to permit them to be deducted from or set off against damages due for property taken or injured, and that no State court had gone so far as to permit the deduction or set-off of such benefits.

His conclusion, from carefully considered premises, was that—

"Congress, by the act of 1893, authorizes the taking of "private property for public use and attempts to pay for "it partly in benefits to be received in the future, and "that contingently. It fails to provide for the just com- "pensation required by the Constitution to be made, and "is therefore an unconstitutional appropriation of private "property which the courts can not carry out."

As to the manner of determining the value of the benefits described in the act and of ascertaining what property will be benefited and what property should be assessed, Judge Cox found the law impossible of execution, and held that—

"The uncertainty on this subject of the present law "makes it impossible to get at and carry out the intent "of the legislative authority, and has the unavoidable "result of making any assessment a matter of guesswork, "or a purely arbitrary distribution of the burden."

The learned judge found it unnecessary to decide whether the recording of the map prepared in compliance with the requirements of the act amounts to a taking, but said—

"That the recording of the map by the Commission- "ers, if nothing is done in pursuance of this step, is only "a less injury to the lot-owners than taking their prop- "erty without paying for it."

And he referred with approbation, and quotes from, a case which he said would have been authority for arresting the preliminary proceeding of recording the map by certiorari or injunction. (Rec. in Nos. 631 and 632, pp. 29-40; Rec. in Nos. 633 and 634, pp. 32-43.)

Appeal from the Decision of Judge Cox.

From the decree dismissing their petition the Commissioners appealed to the Court of Appeals of the District of Columbia.

The Court of Appeals on May 11, 1896, reversed the decree so appealed from and remanded the case to the district court, with directions to modify its judgment and reinstate the cause for further proceedings not inconsistent with the opinion of the Court. (Rec. in 633 and 634, p. 49.)

Opinion of the Court of Appeals.

A majority of the Court of Appeals, Justice Shepherd delivering the opinion of the court, and Justice Morris assenting, held that so much of section 11 as provides for the diminution of the just compensation for the value of the land taken, to the extent of benefits accruing to the remainder, is void, and that section 15 is inoperative by reason of its "failure to conform to the necessary "operations of sections 6 and 7 of the act."

But the court was of opinion that the invalidity of sections 11 and 15 did not make inoperative the entire act, and that both sections might have been omitted without detriment to the general object to be accomplished by the act, and that the court below went too far in declaring the whole act inoperative and void and dismissing the petition. (Rec. in Nos. 631 and 632, pp. 40 to 49.)

Chief Justice Alvey filed a separate opinion, in which he held that the objections taken to section 11 by

Justice Cox did not appear to be well founded when all the provisions of the statute are taken into view, but that the omission of essential provisions from section 15 renders the power of assessment under that section impossible of execution according to settled principles of law, and that the provision authorizing assessments under that section is entirely too indefinite and uncertain to furnish a reasonable and safe criterion for assessing the one-half of the award of damages against the property supposed to be benefited.

The Chief Justice held that the omissions and defects in the act to which he referred do not render invalid the entire act, but could be remedied by an amendatory act of Congress, and that there is no sufficient ground for contending that any of the other sections are amenable to constitutional objection. (Rec. in 631 and 632, pp. 40 to 57).

The opinion of Judge Cox and that of the Court of Appeals are printed in the Appendix to this Brief, and are marked "B" and "C."

Decrees entered in the court below in pursuance of the mandate of the Court of Appeals.

The Court of Appeals having issued its mandate remanding the cause relating to the *Denison and Leighton subdivision* to the Supreme Court of the District of Columbia, holding a special term as a district court of the United States, the district court on June 1, 1896, reinstated said cause and entered a final decree in each of the causes to which these appeals relate, in accordance with the views expressed in the opinion of the Court of

Appeals, vacating and setting aside the verdict of the jury in each of said causes, so far as said verdicts found benefits to the remainder of the lots or parcels of ground only a part of which is taken pursuant to section 11 of the act of Congress, and vacating and setting aside Schedule 3 of said verdict, which assesses against each of the parcels of ground therein mentioned its proportional part of the sum assessed pursuant to section 15 of said act.

Said decrees also adjudged to be condemned, in accordance with the prayers of the petition in each case, except as therein provided, a permanent right of way over the several lots and parts of lots taken for streets, as indicated on the plat filed with each petition; and also adjudged and decreed that there is due and payable to the respective owners of the lots and parts of lots condemned as aforesaid, as compensation therefor, the sums of money set forth in each decree, said sums being the value of the lots and parts of lots so taken, as found by the jury, without allowance for any benefits under the provisions of section 11, and without making any assessments under the provisions of section 15. (Rec. in Nos. 631 and 632, pp. 50–52; Rec. in Nos. 633 and 634, pp. 26–29.)

Appeals from decrees of the District Court to the Court of Appeals.

From the final decree so rendered in the cause relating to the *Ingleside Subdivision*, the respondents, the owners of the lots described in the petition, appealed to the Court of Appeals of the District of Columbia.

The Commissioners also appealed. (Rec. in 631 and 632, p. 57.)

From the final decree so rendered in the cause relating to the *Denison and Leighton Subdivision*, one of the respondents, B. F. Abbot, owner of one of the lots described in the petition in said cause, appealed to the Court of Appeals. The other respondents did not appeal.

The Commissioners also appealed. (Rec. in Nos. 633 and 634, p. 52.)

Affirmance by the Court of Appeals of the final decrees entered in the District Court.

The Court of Appeals on October 5, 1896, duly affirmed the decrees of the court below, and in their opinion filed in each case said that the record of the cases showed that the decree appealed from was entered in the court below in pursuance of the mandate issued by the Court of Appeals in one of the cases and in pursuance of the opinion of the court in that case, and that for the reasons stated in that opinion, the questions of law in the cases being the same, each of the decrees appealed from was affirmed. (Rec. in Nos. 631 and 632, p. 60; Rec. in Nos. 633 and 634, p. 57.)

The appeals to this Court.

From the decree of the Court of Appeals affirming the decree of the district court in the cause relating to the *Ingleside Subdivision*, Nos. 631 and 632, all the respondents, the owners of the lots described in the petition, have appealed to this Court.

The Commissioners have also appealed. (Rec. in 631 and 632, pp. 61 and 62.)

From the decree of the Court of Appeals affirming the decree of the court below in the cause relating to the *Denison and Leighton Subdivision*, Nos. 633 and 634, one of the respondents, B. F. Abbot, the owner of one lot, has appealed to this Court. The other respondents have not appealed.

The Commissioners have also appealed. (Rec. in Nos. 633 and 634, pp. 58 and 60.)

Questions raised by the appeals and cross-appeals.

It is contended by the appellants in No. 631, they being the owners of the parcels of ground in the *Ingleside Subdivision*, to which that proceeding relates, and it is also contended by the appellant in No. 633, the owner of one of the parcels of ground in the *Dennison and Leighton Subdivision* to which that proceeding relates:

1. That the act of March 2, 1893, is invalid, because it provides for the taking of private property for public use without making or providing just compensation therefor.

2. That section 11 is invalid, because it provides for part payment by anticipated and conjectural benefits for land taken for public use.

3. That section 15 is invalid, because the power of assessment for benefits given by this section is indefinite and without limitation or definition, and because the benefits contemplated by the section are not such benefits as can lawfully be made the subject of assessments.

4. That the entire act is void, because of the invalidity of sections 11 and 15.

The Act Authorizing these Appeals.

The act of March 2, 1893, was amended by the act approved January 21, 1896, as follows:

"That section seventeen of the act approved March "second, eighteen hundred and ninety-three, entitled, 'An "act to provide a permanent system of highways in that "part of the District of Columbia lying outside of cities,' "be, and the same is hereby amended so as to read as "follows:

"'SEC. 17. That said court in special term may certify to "the Court of Appeals of the District of Columbia for deci- "sion there, in the first instance, any question of law that "shall arise during any proceedings in said court in special "term under this act. Any party aggrieved by the final "order or decree of said court in special term fixing "the amount of damages, or the assessment for benefits "as to any parcel of land, may take an appeal to said "Court of Appeals, and shall be entitled to a bill of "exceptions as in civil cases triable by jury, and said "Court of Appeals may affirm, reverse, or modify the "order or decree appealed from: *Provided*, That said "Court of Appeals shall consider only questions of law "arising on such appeal. From a final judgment of said "court in special term under this act, distributing the "damages among contending claimants, any party ag- "grieved may in like manner take an appeal to the Court "of Appeals, which court in such cases shall consider "both questions of law and fact. Any appeal under this "act to the Court of Appeals shall be taken within twenty "days after the making of the final order or decree ap- "pealed from, and not afterwards, and shall be subject "to the laws and rules of the court regulating appeals to "said Court of Appeals. Cases arising under this act "shall have precedence in said court over all other cases, "except criminal cases, and the decision of said Court of "Appeals upon any question arising under this act shall "be final: *Provided*, That from any judgment or order "of said Court of Appeals involving any question as to "the constitutionality of this act or any part thereof, any "party aggrieved may, within thirty days after such

"judgment or order shall be entered, appeal to the Su-
"preme Court of the United States. Said court shall
"determine only the question of constitutionality in-
"volved in the case, and shall have power to make such
"special rules and regulations applying to appeals under
"this act as may be proper to bring such cases to a
"speedy hearing and determination.'"

Assignment of Errors.

The Court of Appeals of the District of Columbia erred:

I. In not reversing the decrees of the Supreme Court of the District of Columbia, holding a special term as a District Court of the United States, entered in these suits October 5, 1896, and directing said court to render decrees dismissing the petitions of the Commissioners of the District.

II. In not deciding that the act of March 2, 1893, provides for the taking of private property for public use without making just compensation therefor.

III. In not deciding that the act of March 2, 1893, is unconstitutional and void.

IV. In deciding that the unconstitutionality of the act of March 2, 1893, does not invalidate the entire act.

V. In deciding that the act of March 2, 1893, is not invalid by reason of the invalidity of section 15 thereof.

VI. In deciding that sections 11 and 15 may be declared invalid without affecting the other sections of the act, and without detriment to its general object.

ARGUMENT.

I.

The Jurisdiction of this Court.

The decrees which are brought here by these appeals finally adjudicate and determine the issues and the questions as to the constitutionality of the act of March 2, 1893, and of certain sections of the act, raised by the pleadings and fully argued and considered in the court below. They adjudge the legal rights of the parties to the proceedings, and decree the condemnation of a permanent right of way over certain designated pieces or parcels of ground, and that there is due and payable to the respective owners of pieces or parcels of ground therein described specific sums of money as compensation therefor.

The act of Congress of January 21, 1896, set out in the statement expressly gives to any party aggrieved the right of appeal to this Court from any judgment or order of the Court of Appeals involving any question of the constitutionality of the act of March 2, 1893, or any part thereof.

It further provides that this Court—

"Shall determine only the question of constitution-
"ality involved in the case, and shall have power to
"make such special rules and regulations applying to
"appeals * * * as may be proper to bring such
"cases to a speedy hearing and determination."

Certified copies of these are to be presented to the Treasurer of the United States, and he is required "*to*
"*report the same to Congress for consideration and action.*"

Section 18 provides that whenever any final decree shall have been made under the provisions of the act, and judgment of condemnation entered—

"and appropriation is not made by Congress for the "payment of such award within the period of six "months, Congress being in session for that time after "such award, or for the period of six months after the "meeting of the next session of Congress, *the proceedings* "*shall be void and the land shall revert to the owner.*"

In the course of the argument in the court below it was suggested by the counsel for the Commissioners of the District that the decrees which the act provides for, and which are to be submitted to Congress, are merely reports to Congress for its action.

This view of the law may be presented here, and it may be urged that in view of the fact that the proceedings in which these decrees were entered will fail and become void in the event that Congress makes no appropriation for payment within the six months specified in the act, this Court should not now exercise the jurisdiction which Congress has conferred upon it by the amendatory act above referred to.

The direction contained in section 16 of the act, that a copy of the decree of the court for the payment of the amount found due shall be reported by the Treasurer of the United States to Congress for "consideration and "action" does not indicate the intention of Congress that the conclusions of the court should should not be final, but should be subject to revision by Congress.

In the case of *United States* v. *Irwin* (127 U. S., 125) this Court held that a statute entitled "An act referring

"to the Court of Claims," etc., certain claims *for examination and report*, and which provided that the claims specified should be referred to the Court of Claims "for "adjudication according to law on the proofs hereto- "fore presented, and such other proofs as may be ad- "duced, *and report the same to Congress*," conferred "upon that court full jurisdiction to proceed to final judgment as in the exercise of its ordinary jurisdiction."

The act now under consideration provides for and describes each decree rendered for the payment of damages as a "*final* decree," and all the provisions of the act taken together unmistakably indicate the purpose of Congress to commit to the District Court, as a "*judicial* tribu- "nal," the subject to which the act relates, with full authority and power to adjudicate the matter so submitted to it according to the principles of law applicable to the case, and to enter a formal, regular, and final judgment.

The judicial character of the decrees is not affected by the fact that Congress may or may not appropriate money for their payment.

In this respect the decisions are like the judgments of the Court of Claims, which are reported to Congress, and which can not be executed or carried into effect without an appropriation of money.

This Court exercises jurisdiction of appeals taken from such judgments. The fact that no appropriation has been made, and the possibility that an appropriation may not be made to pay such judgments does not in any way affect the jurisdiction of the Court over the appeals.

United States *v.* Jones, 119 U. S., 477.

This Court has stated with great emphasis, and adheres with great firmness to the rule, that it will "never "anticipate a question of constitutional law in advance "of the necessity of deciding it" (Steamship Company *v.* Emigration Commission, 113 U. S., 39), and has frequently referred to the policy of the acts of Congress in relation to appeals and writs of error, and to its own wish and purpose, to save the expense of repeated appeals in the same suit, and have the whole case, and every matter in controversy in it, decided in a single appeal, unless there are special circumstances which make it necessary or expedient for the Court to take action in a particular case before the case is ripe for final disposition.

In re Chapman, 156 U. S., 211;
McLish *v.* Roff, 141 U. S., 661.

But it is submitted that this general rule is not applicable to these cases, appellate jurisdiction over which has been conferred by special act and that there are special reasons why the jurisdiction conferred be now exercised.

The act of March 2, 1893, provided for appeals to the District Court of Appeals, but not to this Court.

The amendatory act authorizing appeals to this Court was approved after the verdict was rendered in the proceeding relating to the *Denison and Leighton subdivision*, and while the motion to set the verdict aside was pending in the District Court, and must be considered as having been passed with reference to the proceedings then pending, and in order to obtain the review by

this Court of the very questions that had then been raised and that are now presented by the decrees appealed from.

The provisions in the amendatory act giving this Court power to make special rules and regulations with reference to appeals under the act in order to bring such cases to a "speedy hearing and determination," indicate the intention of Congress that the appellate jurisdiction thereby conferred should be exercised without reference to the contingency of an appropriation to be made or refused, and without reference to the contingency upon the happening of which the decrees and the suits in which they have been entered may fail.

The decrees are now operative and in full force, and they will remain in force for at least a year from the present time, even if Congress, in the meantime, shall make no appropriation for their satisfaction. The possibility that they may, at some future day, become invalid can not affect the present jurisdiction of this Court, or require or justify the suspension of the exercise of that appellate jurisdiction which the amendatory act contemplates shall be exercised so as to obtain a "speedy determination" of the questions of constitutional law which the Court is authorized to review.

The appeals now before the Court must be entertained and determined by the Court, or they must be dismissed. If dismissed, the questions of constitutionality which they present can not be brought before this Court by any

other appeals in these cases, for the reason that the decrees appealed from are final, and determine all the issues in the cases, and no other decrees can be rendered therein, except in respect of the distribution of whatever money may hereafter be appropriated.

If Congress were to appropriate the money adjudged to be due and payable by the terms of the decrees, the parties to these proceedings could not again, in these proceedings, or by some new proceeding, raise the questions and assert the rights that have been finally adjudicated by the Court of Appeals. They would be held to be concluded by those decrees, from which no appeal lies after the expiration of thirty days from the day on which they were entered.

The questions of constitutionality which are involved in these cases now before the Court, are also involved in forty-five other cases of like character still pending in the district court, and they will be involved in every proceeding that may hereafter be begun under the provisions of the act of March 2, 1893. They directly affect the interests of multitudes of people and the greater part of all the land within the limits of the District of Columbia. A speedy determination of them by this Court is of incalculable importance to all the inhabitants of the District.

II.

The Act authorizes the Taking of Private Property for Public Use without Making or Providing Just Compensation Therefor, and is Unconstitutional and Void.

1. The first section of the act of March 2, 1893, authorizes and directs the Commissioners of the District of Columbia to "prepare a *plan* for the extension of a *permanent* "*system of highways* over all that portion of said District "not included within the limits of the cities of Wash- "ington and Georgetown," and it provides that the system "shall be made as nearly in conformity with the "street plan of the city of Washington as the Commis- "sioners may deem advisable."

The exercise of the power thus conferred necessarily requires the Commissioners to ascertain and determine what highways shall be established, and what abandoned or dispensed with, in whole or in part.

When their decision has been made and a plan adopted of any section, they are required by the second section to make a map "showing the boundaries and dimensions "of and the number of square feet in the streets, avenues, "and roads *established by them therein.*"

The map, when adopted by the Commission created by the act, is to be recorded in the office of the Surveyor of the District, and the act gives to it, when recorded, definite operation and effect, and prescribes certain functions that it is to perform, and prohibits the doing of

certain things in respect of the land within its limits and provides that—

"No further subdivision of any land included therein "shall be admitted to record in the office of the Sur- "veyor of said District, or in the office of the Recorder of "Deeds thereof, unless the same be first approved by "the Commissioners and be in conformity to such map. "Nor *shall it be lawful*, when any such map shall have "been so recorded, for the Commissioners of the District "of Columbia, or any other officer or person representing "the United States or the District of Columbia, *to there-* "*after improve, repair*, or assume any responsibility in "regard to any *abandoned highway* within the area cov- "ered by such map, or to accept, improve, repair, or as- "sume any responsibility in regard to any highway that "any owner of land in such area shall thereafter attempt "to lay out or establish, unless such land owner shall "first have submitted to the Commissioners a plat of such "proposed highway and the Commissioners shall have "found the same to be in conformity to such map, and "shall have approved such plat and caused it to be "recorded in the office of said Surveyor."

The fifth section authorizes the Commissioners to "*name* "all streets, avenues, alleys, and reservations *laid out* or *adopted*" under the provisions of the act.

It is the manifest purpose of the act, therefore, by means primarily of the action of the Commissioners in preparing the map, by means of the map which shows the action and determination of the Commissioners, and by making the map a public record, to provide thereby, obtain, and make, and give public notice of, the *absolute, definite, and permanent location and establishment of certain highways, and the unconditional and final abandonment in whole or in part of other highways shown thereon.*

The original map of section 1, which was duly recorded

on the 31st of August, 1895, makes this purpose manifest and the effect and functions of the map conspicuous.

It is entitled:

"Maps of the plan for the extension of a permanent "system of highways for the suburban section, north of "Boundary street or Florida avenue and between North "Capitol street and Rock Creek. First section, 1895."

The certificate of the Commissioners identifies it as being the plan adopted by them, and that it is as nearly in conformity with the street plan of Washington as they deem advisable and practicable.

On the sheet of explanations accompanying the map and required by the act, and on the map, a certain color is used to designate the "new" and established highways, and another color to designate the highways dispensed with.

Within the area of these highways are numerous dwelling houses and other buildings, and entire building lots and numerous lots of considerable size, which are left without access to any street or road by the abandonment of highways or parts of highways on which they abut, and also numerous tracts of farm, garden, and unoccupied land, which have never been subdivided and which are not, therefore, involved in any pending proceeding, and which may not be proceeded against for years to come.

The new highways laid down on the map are highways "established" by competent authority pursuant to law, and the land within their limits has been and is by the operation of the law approved and set apart as and declared to be for use as a highway and to be for a high-

way as effectually and finally as though the owner's title had been duly divested and manual possession taken.

Independently of the fate of these proceedings, and whether Congress shall make or refuse appropriations to pay the money found to be due to lot owners, and whether the highways are or are not hereafter opened they will remain "established" highways, and the lands within them will remain set apart and designated for permanent use for highways so long as the act of March 2 shall remain in force, and the owners will hold possession and occupy and dispose of it, subject to the inhibitions imposed by the act and to the permanent uses that have been impressed upon it.

It is not the office of the map merely to give notice of what may be done. It is a record of what *has* been done. It is a record and description of the boundaries and areas of the spaces that have been permanently set apart and designated for highways, and the act intended that such should be its operation.

There can be no doubt that what the act provides for and what has been done under its provisions must seriously affect the land owner and the value of his land. The magnitude of the interests and of the property involved is shown by the map.

The area of the entire section 1 is stated thereon to be 5,218 acres, or 227,293,000 square feet of ground, exclusive of existing and proposed parks.

The area of what are designated on the map as "*established highways*" is stated thereon to be 1,816 acres, or 79,726,000 square feet of ground, or more than one-third of the entire area.

Although the area of the two subdivisions affected by the present proceedings is insignificant when compared with the area of the entire section, yet the value of the land taken in the *Denison and Leighton Subdivision* was found by the jury to be $190,167.26, and the value of the land taken in the Ingleside Subdivision was found to be $36,736.73. (Rec. in Nos. 633, 634, p. 14; Rec. in Nos. 631, 632, p. 18.)

The area of the District of Columbia, outside the cities of Washington and Georgetown, is 38,425 acres.

If, in extending the permanent system to the other sections of the District, land is taken in the same proportion, then the entire area taken and included within the limits of the new highways will be more than 10,600 acres, the value of which, at the rate of $400 per acre, or one cent per square foot, would be between four and five million dollars.

It is the plain purpose of the act, by means of the preparation and recording of the maps therein provided for, to completely and permanently set apart and designate for use *as* public highways, and *for* public highways thereby established, lands of private owners. The quantity of the land that will thus be set apart and designated, will amount to not less than one-third of all the lands held by private owners outside the limits of Washington and Georgetown.

Can this be done without making just compensation therefor?

Are the land owners entitled to the guaranty contained in the Fifth Amendment to the Constitution, and to the

liberal interpretation thereof, according to the rule laid down by this court in the case of Boyd *v.* U. S., 116 U. S., 617, and in many other cases, or are the injuries and damages resulting, and to result, to the land owners, merely inconveniences and hardships necessarily incident to the ownership of property, and for which no compensation is due?

It is well settled that the term property, as used in the Fifth Amendment, is not limited to land itself, but embraces all the incidents which give it value to the owner, and includes the rights which pertain to the ownership to things real and personal, and whenever there is a direct and substantial invasion of these rights there is a taking in the constitutional sense, conferring upon the owner a right to compensation. There may be a taking, although manual possession be not taken.

It is the contention of these appellants that the act contemplates and provides for, and that there has already been completed, by means of the map of section 1 and the permanent establishment, definite and final location of the highways therein described, such a *taking* of the land owners' property, and such an actual *invasion* of, and *encroachment* upon, such an interference with, and interruption of the owners' use, possession, and right of disposition of the lands within the limits of the established highways, as to entitle them to compensation therefor.

Their contention, also, is that the question thus presented by these records is wholly different from that decided by the court in the case of *Shoemaker* v. *U. S.*

(147 U. S., 321), with reference to the effect of the mere filing of a map, and from that decided in Prosser *v.* P. R. R. C. (152 U. S., 63), and is to be determined rather by the principles stated by this court in the case of Pumpelly *v.* Green Bay Company (13 Wall, 180), and in the case of Transportation *v.* Chicago (99 U. S., 640).

In the case of *Pumpelly* v. *Green Bay Company* (*supra*), this Court held that it is not necessary "that "property should be absolutely *taken*, in the reasonable "sense of that word to bring the case within the protec- "tion of this constitutional provision, and that there "may be such serious interruption to the common and "necessary use of property as will be equivalent to a "taking of the property."

In its opinion (Miller, J.), the Court said that it remains "true that where real estate is actually invaded "by superinduced additions of water, earth, sand, or "other material, or by having any artificial structure "placed on it, so as to effectually destroy or impair its "usefulness, it is a taking, within the meaning of the "Constitution, and that this proposition is not in conflict "with the weight of judicial authority in this country, "and certainly not with sound principle."

In the case of *Transportation Company* v. *Chicago* (99 U. S., 640), this Court referred to the case of *Pumpelly* v. *Green Bay* (*supra*), and to the case of *Eaton* v. *Boston C. & M. R. R. Co.* (51 N. H., 594), as stating the "extremest "qualification" of the provision under present considera- tion. But the Court did not overrule or disapprove its former decision, and it is clearly to be inferred that

acts directly encroaching upon private property and interfering with its use or making its use permanently more inconvenient, constitute a taking within the meaning of the constitutional prohibition.

Lewis on Eminent Domain, chap. 3, and cases cited;

The Evansville & C. R. R. Co. *v.* Dick, 9 Ind., 436.

If the act expressly prohibited building upon the land within the limits of the established streets, there is abundant authority for saying that such a provision would be held unconstitutional.

Moale *v.* Baltimore, 5 Md., 321;

State, Jones, Prosecutor, *v.* Carragan, 36 N. J. L., 52;

St Louis *v.* Hill, 116 Mo., 527;

Forster *v.* Scott, 136 N. Y., 577;

In re Rogers Avenue, 22 N. Y., Supt., 27.

Yet the existence, and the permanency, of the established highways described in the recorded map are in effect and in reality as much prohibitions against building as if words of prohibition were contained in the statute.

The present predicament of the property within the boundaries of the streets and avenues, and the inevitable effect of what has already been done under the provisions of the act, are well indicated in the opinion of the Supreme Court of New Jersey (Beasley, C. J.), in the case of *State* v. *Hudson County Avenue Commissioners* (37 N. J. L. W.).

In respect of the contention that the survey and location of a road under a law which was found impossible of execution should remain in force, the court said:

"This official survey, brought before us by this writ, "is, and must remain under the law in its present state, a "mere dead letter so far as the public is concerned, but "it is and must be a very serious incumbrance upon "the property which it traverses. As long as this map "shall remain upon the public records, threatening the "property which it embraces with the realization of the "scheme of which it formed a part, so long there is "every reason to believe the property will have its value "affected in the market. * * * I do not believe the "law will permit a landholder to be held at such a dis-"advantage. This adopted survey constitutes some-"thing very like a conditional lien on this land, and "that lien can not, with any sort of justice, be suffered "to remain in the illusive anticipation of future leg-"islation."

It has been already stated that the abandonment of parts of certain streets and avenues laid down on the recorded map leaves some parcels of ground without access to the highway so abandoned, or to any other street or highway. This is the condition of Lot 50, for instance, in *Denison and Leighton's Subdivision* (Record in cases 633 and 634, p. 4), and of lots in *Ingleside Subdivision* (Record in cases 633 and 634, p. 4).

"The discontinuance or vacation of a street in such a "manner as to prevent access to the property of an ad-"joining owner is a 'taking' of property within the con-"stitutional inhibition, and can not be lawful without "compensation to such owner."

Elliott on Roads and Streets, 662.

In the case of *Pearsall* v. *Board of Supervisors* (74 Mich., 558), directly relating to the *discontinuance* of a highway

and the right of an adjoining land owner to compensation therefor, the Supreme Court of Michigan said:

"The term, taking, should not be used in an unrea-
"sonable or narrow sense. It should not be limited to
"the absolute conversion of property and applied to land
"only, but it should include cases where the value is de-
"stroyed by the action of the Government or serious
"injury is inflicted to the property itself, or exclusion of
"the owner from its enjoyment or from any of the ap-
"purtenances thereto. In either of these cases it is a
"taking within the meaning of the provision of the Con-
"stitution.

"A partial destruction or diminution in value is a
"taking."

* * * * * * *

"If the public take any action which becomes neces-
"sary to subserve public use, and valuable rights of an
"individual are thereby interfered with and damaged or
"destroyed, he is entitled to the compensation which the
"Constitution gives therefor, and such damage or de-
"struction must be regarded as a 'taking.'"

See, also, cases cited in Elliott on Roads and Streets, p. 663 and cases cited.

The act is amenable to objection on another ground.

Section 15, after providing that the same jury which shall assess the damages caused by the opening of any highways shall also assess against each parcel to be benefited its proper proportional part of the whole of one-half of the damages, further provides that directly such assessment is confirmed by the court it *shall be a lien upon the land assessed*, and be payable in five equal annual installments, with interest at the rate of four per cent. per annum *from the date of the confirmation of the assessment by the court.*

The lien thus created attaches to the property and re-

mains thereon from the date of the decree of the court until the money thereby is paid, or until the proceeding becomes void by reason of the lapse of the time specified in section 18.

If the act had been held valid in all its provisions by the District Court and Court of Appeals, and the assessments provided for by the act had been made, there would now be existing liens on the lots assessed, bearing interest at the rate of four per cent. per annum from the date of the confirmatory decree of the court.

Certainly such an incumbrance, which, might under the provisions of the law, continue and be fully operative for months would invade and encroach upon the owners' right, impair the title, and impair the value of the land to which the lien would attach.

2. It has been shown that permanent highways have been established and located over the lands of these appellants, and that the lands within the limits of the established highways have been permanently set apart and designated to be used for highways, and that certain highways have been finally abandoned and prohibitions declared against certain uses of their property by the owners. All this has been done in the exercise of the right of eminent domain, and in pursuance of the provisions of the act of Congress under consideration.

Although the legal title to the land has not been formally divested, and although the owners are left in nominal occupancy, the character of the land has been changed, and the owners have been in a just and legal

sense deprived of their property rights therein, which have been taken for public use. What remains to them is the naked legal title and temporary possession.

It is of course competent for Congress to provide that the lands of these appellants or any other lands may be thus taken and made the areas of highways, but for this practical appropriation and the conversion of their land to a special and public use the owners are entitled to a just compensation. No compensation has been made and none provided for, nor does the act contemplate that any shall at any time be made.

In the recent case of Sweet *v.* Rechel (159 U. S., 380), which came up from the Circuit Court of the United States for the district of Massachusetts, and involved the construction of the clause of the Constitution of Massachusetts, which provides that "whenever the public re-"quire that the property of any individual shall be ap-"propriated to public uses he shall receive a reasonable "compensation therefor," and also involved the construction of a Massachusetts statute; after a full review of the Massachusetts decisions relating to the subject and those of this court, held that—

> "The authority of a legislature to enact provisions for "taking private property rests upon its right of eminent "domain; and it is a condition precedent to its exercise "*that the statute conferring the power make reasonable pro-*"*vision for compensation to the owner of the land.*"

In the case of the Haverhill Bridge Proprietors *v.* Essex County Commissioners (103 Mass., 120), cited in

the opinion of this court in the case cited, the court said:

"The duty of paying an adequate compensation for "private property taken is inseparable from the exercise "of the right of eminent domain. *The act granting the "power must provide for compensation and a ready means of "ascertaining the amount.* Payment need not precede "*the seizure, but the means for securing indemnity must be "such that the owner will be put to no risk or unreasonable "delay.*"

These principles of law are well settled, and, for the reasons already stated, are applicable to these cases.

The act was apparently framed to evade the operation and effect of this wholesome doctrine, and to secure all that is of real value to the land owner, without paymen to him therefor.

Although it provides that verdicts may be obtained and decrees and judgments entered in favor of the owners, it does not provide for the payment of the judgments, nor any method by which they can be enforced; but does expressly provide for most unreasonable and indefinite delay, while Congress is considering whether or not it will finally pay the decrees and judgments which have been entered under the provisions of the laws it has itself enacted.

If this construction of the act is upheld, the title of the private citizen to lands in the District of Columbia, his right to own, to hold, to possess, and to convey, and his full enjoyment of the rights incident to the ownership of real estate, will be effectually destroyed.

III.

The Provisions of Section 11, by which compensation for parts of Lots taken for public use is to be diminished, or in part paid by estimated benefits to those parts of the lots not taken, are unconstitutional and void.

Section 11 directs that in assessing *damages* in cases arising under the act where a *part* only of any parcel of land is condemned, the jury shall take into consideration "the *benefit* the *purpose* for which it is taken *may be* "to the owner or owners of such tract or parcel *by en-* "*hancing the value* of the *remainder of the same,* and shall "give their verdict accordingly."

The validity of this provision, in which the term *damage* is inaccurately used as signifying *compensation,* was directly in issue in the court below, and these appeals involve and present for decision the grave and important question, not heretofore decided by this Court, it is believed, whether or not in those cases in which the United States, in the exercise of the right of eminent domain, takes a *portion only* of a parcel of land, compensation for the portion so taken can be made wholly or partly in benefits resulting to the remainder from the purpose for which a part is taken.

The decisions of the State courts on this subject reveal the greatest diversity and contrarity of opinion.

In one class of cases it is held that benefits can not in *any* case be set off against or deducted from the damages caused by the taking of property.

In another class it is held that benefits may not be set off against the value of the land actually seized, but may be set off against the incidental injuries and damages caused by the taking of property.

In a third class it is held that special benefits may be set off against the value of land taken when only a part of a parcel is taken, as well as against incidental injuries and damages.

It has been said that the weight of authority in the State courts favors the proposition determined in the class of cases last referred to, but a careful examination of all the cases that have arisen in State courts will show that the decisions against the proposition, if not so numerous, are of at least equal importance when considered with reference to the character of the several courts, and to the reasoning by which their decisions are reached, and the considerations on which they are based.

Pertinent decisions by Federal courts are few, and there has been no adjudication of the question by this Court. The appeals now before the court seem, therefore, to permit an authoritative and final interpretation by this Court of a great and salutary constitutional provision, intended for the protection of the citizen's rights of property, and to finally determine the same according to the general and established principles of law.

The argument in support of the decision of the court below, which adjudged section 11, and also section 15, invalid, is to be fully presented in the brief of other counsel, and it is not the purpose of this brief to discuss here at any length the provisions of those sections, or to do more than briefly state some propositions of a con-

trolling character, which are supported by the best considered cases.

The power of the United States to take private property for public use is definitely limited by the provisions of the Fifth Amendment to the Constitution.

The question of compensation is judicial and not legislative, and Congress has no power to determine what the measure of compensation shall be.

The term "compensation" in the Fifth Amendment has a definite and ascertained signification. It means money—constitutional currency.

Money—constitutional currency—and money alone, is the full and perfect equivalent for property taken.

It is not within the power of Congress to substitute for money some other consideration, and enact that the consideration so substituted shall constitute compensation.

The expropriator has no power to require the owner to receive, in the place of money, a consideration other than money, which the expropriator may think advantageous to the owner, but which the owner is unwilling to accept.

It would be as reasonable and lawful to require the owner to accept for land taken, payment therefor in merchandise or other land, as to require him to accept instead of money benefits, the value of which is to be determined by a jury.

The compensation guaranteed is compensation for the property taken.

The effect of the taking on the general interests or fortunes of the owner, his gain or loss in respect of *other land*, do not concern the expropriator, nor affect or modify

in any way the guarantee which relates solely to the *land* taken.

To permit benefits to take the place of money in the payment of a just compensation for land taken, would be to substitute for the standard or measure of value prescribed by the law the opinion of a jury.

In the attempt that was made to practically execute and carry into effect section 11 in the proceedings relating to the *Denison and Leighton* subdivision, the value of all the parcels of ground taken was found by the jury to be $190,167.26, and the value of the benefits found to be $40,395.40 (Record in Nos. 633 and 634, p. 14), more then one-third of the value of the property taken.

In the other case relating to the *Ingleside* subdivision, the benefits were found by the jury to be nearly half the value of the property taken.

Yet no benefits had been actually conferred, and none existed except in anticipation and in the imaginations of the jurors.

A clear and most forcible statement of some of the reasons which support the foregoing propositions is to be found in the opinion of the Court of Appeals of Kentucky (Robertson, C. J.), in the case of Jacob *v.* City of Louisville (IX Dana, 114), in which was involved the construction of the guarantee given by the Constitution of Kentucky of a just compensation to every person whose property shall be appropriated to public use.

"A just compensation for property applied to public "use clearly implies, as we think, the value of the prop- "erty in money. If the owner derive any incidental ad-

" vantage or benefit from the manner in which it is " applied to public use, others participate in some degree, " and perhaps equally, in the same or similar advan- " tages resulting to them also; and it would be unjust to " exact from the one an equivalent for his incidental " benefits, while the others enjoy theirs without the like " exactions. Besides, if the owner of the property can, " in any case, be compelled to surrender it to the public " use, without receiving the value of it in money, the " constitutional guarantee would be ineffectual and de- " lusive in many, and probably most cases; because the " tribunal, which decides on the retribution to which he " may be entitled, is a portion of the public to whose " use the property is applied, and may decide that the " public appropriation of it will be beneficial to the " owner, when, in his own judgment, or in fact, it will " be injurious to him. And if he be required to accept, " in lieu of his property taken from him without his " consent, any other thing than money, he may, in fact, " receive less than an equivalent, or even nothing what- " ever of any actual value to him; because the value of " everything, except money, depends on opinion and ac- " cident. And if, as in this case, the compensation be " offered in mere speculative advantage, which may exist " only in the opinion or imagination of an interested " jury, he may receive nothing of value to himself, or in " his own opinion.

" In this very case, the jury may have estimated the " value to Jacob, or the extension of the street through " his land, at about three thousand dollars, under the " belief that such extension would enhance to that ex- " tent the public estimate of the land, and facilitate " its improvement and sale; and, at the same time, " Jacob may not desire, but even have reason of regret, " any such factitious augmentation in estimated value, " and the extension of the street may operate as an annoy- " ance to him, and frustrate some cherished enjoyment " of the land by himself, so as to be actually and grievously " prejudicial to him. And, as to his own lawful use " and enjoyment of his own estate, he is the only consti- " tutional or rightful judge.

" Moreover, if the public can pay for private property " taken for public use, by setting off against its value the

" ideal value attached by a portion of the same public to
" prospective advantages expected to arise to the owner
" from the use to be made of his property, then the
" amount of compensation, or whether there shall be any
" at all, will, in every case, depend on no fixed prin-
" ciple or certain criterion, but will often depend on the
" sovereign will, or on popular prejudice, caprice, or
" mere imagination.

" To secure the citizen against any such despotism was
" the object of the conservative provision in our State
" Constitution, which declares that private property shall
" not be taken for public use without a just compensa-
" tion, unless the owner consent.

" If the local public of Louisville desires the use of
" Jacob's land that public shall pay him, in money, the
" real value of the ground before he be required to sur-
" render it. He does not desire that such use be made of
" it, and is unwilling to give it to the city, and can not be
" compelled to do so. It is enough that it may, neverthe-
" less, be taken from him upon the payment of its value.
" When the street shall be extended he, as well as every
" other citizen, will be entitled to enjoy, without charge,
" its incidental advantages, unless he should claim dam-
" ages for incidental disadvantages, and then the value of
" advantages might be set off against that of disadvan-
" tages resulting from the same public act; because, if
" the extension of the street be productive of benefits to
" him, to that extent he is compensated for correspon-
" dent disadvantages, and would in fact sustain no
" damage.

" But when the city, in the exercise of the qualified
" right of eminent domain, delegated to it by the legis-
" lature, applies Jacob's land to its own use without his
" consent, it incurs a debt under the paramount law, and
" which can not, in our judgment, be constitutionally dis-
" charged, without his consent, by a tender of any other
" thing than money, or by less than the full money value
" of his land. In paying the value of his land he will
" be required to make his individual contribution as a

" citizen of Louisville, and the amount of that contribu-
" tion may be augmented by the enhanced value of his
" ground arising from the extension of the street. This
" is the utmost that should be exacted from him for
" opening a street for the public use and benefit."

In the case of the Monongahela Nav. Co. *v.* United States (148 U. S., 312) this Court refrained from expressing any opinion on the vexed question as to the extent to which the benefits or injuries to the portions not taken may be used as a set off, yet the considerations set forth in the opinion of the court and the reasoning by which the court reached its decision and the logic of its decision seems to be decisive in these cases also, and to lead irresistibly to the conclusion that the decrees of the court below entered in conformity to the opinion of the Court of Appeals, and in conformity to the opinion of the same court in the case of the Prospect Hill Cemetery Company *v.* District of Columbia (5 App. Cases D. C., 497) must be affirmed so far as they relate to and affect section 11.

Even if it should be held that Congress has the power to require that benefits shall be considered in determining what is due as compensation for property taken for public use, still the benefits described in section 11 are not of the kind which can be made a part of such compensation or deducted from the value of the land taken.

Whether the benefits specified are only those that may result from the *purpose* for which land is taken, or whether they include those that may result from the opening and improvement of streets and avenues, they

are alike "incapable of definite ascertainment, and rest "merely in conjecture, possibility or probability de- "pendent on the future."

Certainly the present advantage to land, of a mere *purpose* that may or may not be executed in the future, can not be ascertained and can not be expressed in dollars and cents.

If the fact of recording the map is the benefit contemplated, as has been claimed on behalf of the Commissioners, it can only be on the theory that the land within the limits of the streets laid down on the map has already been taken. But this is strenuously denied on behalf of the Commissioners.

If, however, section 11 and section 15 are to be considered together (as they must be to give even speciousness to the contention on behalf of the Commissioners), then it is the purpose to open and improve the streets and avenues described on the map which constitute the benefit that is to be considered in assessing damages.

The fact that no streets have been opened or improved and no opening or improvement has been provided for and never may be provided for, makes such consideration and any deduction on that account from the value of land taken impossible. Diligent search has failed to reveal a single instance in which a statute has provided that benefits may be deducted or assessed in respect of merely projected highways not opened or improved, and for the opening or improvement of which no provision had been made.

IV.

The Provisions of Section 15 are impossible of execution, inoperative, and void.

Section 15 directs that one-half of the amount awarded as damages for each highway or reservation condemned and established under the act "shall be "charged upon the lands benefited by the *laying out and* "*opening* of such highway or reservation or part thereof," and requires that the same jury which assess the damages caused by the *opening* of any highway "or the *aban-* "*donment* of an existing highway shall ascertain what "property is thereby *benefited* and shall assess against each "parcel which it shall find to be so benefited *its proper* "*proportional* part of the whole of said one-half of the "damages."

This extraordinary requirement is that the amount found due by the jury as compensation for land taken, and the amount found due as damages caused by the *opening* of streets and the amount found due as damages caused by the *closing* of streets shall be added together, and one-half of the aggregate is to be charged upon and collected from the land benefited, and one-half charged against the revenues of the District.

In this way the entire cost and damages resulting from the taking of land and the opening of and closing of highways under the act is provided for and put upon the land owners, and the United States is wholly relieved from any burden, expenditure or liability in relation thereto.

There are several fatal objections to this scheme.

1. The benefits contemplated and which the jury is required to estimate and apportion are remote, contingent, and speculative. They can have no existence at the time they are made the basis of assessments. It is impossible to compute them or make any estimate of their value in money.

2. It is determined in advance by the provisions of this section that the general benefits which are to be assessed will amount to a sum equal to one-half of the value of the property taken added to the amount due as damages for opening and closing streets.

It is not left to the jury to ascertain the actual value to the owner of the benefits to his land. This is fixed by the act, and the jury is then required to assess against each lot "*its proper proportional part.*"

3. The effect of the section is to charge against the land owner and to include in the assessment of benefits the amount of damages occasioned to particular lots by opening or closing streets or highways.

4. Section 15 does not, nor does the act anywhere, define the territory within which assessments for general benefits may be made, nor does it confer that power on the court.

5. Section 15 does not, nor does the act anywhere, prescribe the manner or the rules according to which general benefits are to be assessed or apportioned.

6. The act provides for separate proceedings in respect of each suburban subdivision, and that notice be given in respect of each proceeding to those interested therein.

But the provisions of section 15 are so general and vague that it may be well claimed that any parcel within the District of Columbia may be found by the jury to be benefited within the meaning of the act, and may be charged with its proportional part of the aggregate sum to be assessed.

The owners of all lands which might be assessed under this section, would unquestionably be entitled to notice and hearing in respect of the question whether their lands are benefited, and, if so, to what extent.

As the section fails to make provision for notice, it is invalid.

Spencer *v.* Merchant, 125 U. S., 356.

V.

The presence of Sections 11 and 15, which are void, invalidates the entire Act.

Section 11 provides that compensation for property taken for public use under the terms of the act shall be made partly in benefits.

The benefits which are to constitute part payment are future, contingent, and conjectural.

Section 15 provides that benefits of the same kind shall be assessed against the benefited land to the extent of one-half of the amount awarded as damages for each highway condemned and established under the act, and that the other half shall be charged against the revenues of the District.

It is contended that these provisions are repugnant to the last clause of the Fifth Amendment of the Constitu-

tion, for the reason that the "just compensation" therein provided for means "the actual value of the property "taken, payable in money and without diminution on "account of benefits general or special."

If this contention is well founded, it necessarily follows that these void provisions invalidate the whole act.

The principles and rules by which courts are guided in determining when and under what conditions and circumstances one or more sections or parts of an act may be held invalid without affecting the remaining portions of the statute are well settled.

They have been so recently the subject of consideration and full exposition by this Court in the case of *Reagan* v. *Farmers' Loan and Trust Company* (154 U. S., 349–395) and in the case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 429–586), and in the case of *Pollock* v. *Farmers' Loan and Trust Company* [rehearing] (158 U. S., 601–636), that it seems wholly unnecessary to refer to or to discuss earlier decisions or other authority.

In the case of *Reagan* v. *Farmers' Loan and Trust Company* (*supra*) this Court said:

"It is familiar law that one section or part of an act "may be invalid without affecting the validity of the "remaining portion of the statute. Any independent "provision may be thus dropped out if that which is left "is fully operative as a law, *unless it is evident* from a "consideration of all the sections that the legislature "would not have enacted that which is within, inde-"pendently of that beyond its power."

In the case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 429–583) this Court held that so much of the act to "reduce taxation, to provide revenue for the

"Government, and for other purposes" (28 Stat., 509, c 349) as provides for levying taxes upon rents or income derived from real estate or from the internal or municipal bonds is in violation of the Constitution of the United States and is invalid.

Upon the question whether the void provisions as to rents and income from real estate invalidated the whole act, the justices who heard the argument were equally divided and therefore no opinion was expressed.

After rehearing and re-examining the case with the utmost deliberation and care, and aid by the arguments of counsel, whose eminence and ability were commensurate with the importance and gravity of the case, this Court held that the tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and therefore unconstitutional and void because not apportioned according to representation, *all these sections, constituting one entire scheme of taxation, are necessarily invalid.*

After stating the reasons which led the Court to adhere to the opinion previously announced as to the invalidity of those provisions just mentioned, the Court said (Fuller, C. J.):

"Being of opinion that so much of the sections of this "law as lays a tax on income from real and personal "property is invalid, we are brought to the question of "the effect of that conclusion upon these sections as a "whole.

"It is elementary that the same statute may be in part "constitutional and in part unconstitutional, and if the

"parts are wholly independent of each other that which "is constitutional may stand while that which is uncon- "stitutional will be rejected. And in the case before us "there is no question as to the validity of this act except "sections twenty-seven to thirty-seven, inclusive, which "relate to the subject which has been under discussion; "and as to them, we think the rule laid down by Chief "Justice Shaw in Warren *v.* Charlestown (2 Gray, 84), is "applicable—that if the different parts 'are so mutually "'connected with and dependent on each other, as con- "'ditions, considerations, or compensations for each "'other as to warrant a belief that the legislature in- "'tended them as a whole, and that, if all could not be "'carried into effect, the legislature would not pass the "'residue independently, and some parts are unconsti- "'tutional, all the provisions which are thus dependent, "'conditional, or connected must fall with them.' Or, "as the point is put by Mr. Justice Matthews in Poin- "dexter *v.* Greenhall (114 U. S., 270–304), 'It is undoubt- "'edly true that there may be cases where one part of a "'statute may be enforced as constitutional and another "'be declared inoperative and void, because unconstitu- "'tional; but these are cases where the parts are so dis- "'tinctly separable that each can stand alone, and where "'the court is able to see and to declare that the inten- "'tion of the legislature was that the part pronounced "'valid should be enforceable, even though the other "'part should fail. To hold otherwise would be to sub- "'stitute, for the law intended by the legislature, one "'they may never have been willing by itself to enact.' "And again, as stated by the same eminent judge in "Sprague *v.* Thompson (118 U. S., 90–95), where it was "urged that certain illegal exceptions in a section of a "statute might be disregarded, but the rest could stand: "'The insuperable difficulty with the application of that "'principle of construction to the present instance is "'that by rejecting the exceptions intended by the Leg- "'islature of Georgia the statute is made to enact what "'confessedly the legislature never meant. It confers "'upon the statute a positive operation beyond the legis- "'lative intent, and beyond what any one can say it "'would have enacted in view of the illegality of the "'exceptions.'

"According to the census, the true valuation of real "and personal property in the United States, in 1890, "was $65,037,091,197, of which real estate with improve- "ments thereon made up $39,544,544,333. Of course, "from the latter must be deducted, in applying these "sections, all unproductive property, and all property "whose net yield does not exceed four thousand dollars. "But even with such deductions, it is evident that the "income from realty formed a vital part of the scheme "for taxation embodied therein. If that be stricken out, "and also the income from all invested personal property, "bonds, stocks, investments of all kinds, it is obvious that "by far the largest part of the anticipated revenue would "be eliminated, and this would leave the burden of the "tax to be borne by professions, trades, employments, "or vocations. And in that way what was intended as "a tax on capital would remain, in substance, a tax on "occupations and labor. We can not believe that such "was the intention of Congress."

* * * * * * *

"Being invalid as to the greater part, and falling, as the "tax would, if any part were held valid, in a direction "which could not have been contemplated, except in con- "nection with the taxation considered as an entirety, we "are constrained to conclude that sections twenty-seven "to thirty-seven, inclusive, of the act, which became a "law without the signature of the President, on August "28, 1894, are wholly inoperative and void."

The principles and rules of construction thus plainly and authoritatively stated by this Court are strictly applicable to the case presented by these appeals.

The single object of the act of March 2, 1893, is to provide a permanent system of highways *at the cost of the land owners benefited thereby, and of the District of Columbia, but not at the cost of the United States.*

What the *intention* of Congress is, is manifest and indisputable.

If it were permissible to refer to the legislative history

of the act, it would be seen that the legislative purpose was at the outset deliberately formed and made conspicuously certain.

The Committee on the District of Columbia reported to the House of Representatives a bill which provided that the expense of opening each highway should be equally divided between the land owners, the District, and *the United States*, for the reason that the proposed system was not of merely local advantage but was to a considerable degree a "national undertaking."

Report No. 866, H. R., 52d Cong., 1 Sess.

But in the act as passed not only was the provision for charging the United States with one-third of the expected expense omitted, but it is expressly declared in section 15 "*that no expense for the improvement of any "street, circle, reservation, or avenue shall be chargeable to the "Treasury of the United States.*"

The provisions of sections 11 and 15 are an integral and inseparable part of the act. They constitute the inducement or consideration for the other parts of the act. They and the other provisions are so connected, interdependent, and conditional that there can be no severance or separation without destroying the integrity and completeness of what was intended to be a single, complete, and harmonious enactment.

It can not be denied that if sections 11 and 15 were dropped from the statute, that which would remain would be *essentially different* from what the act would be if the whole law as it stands were held valid, and there would be absent a vital and essential feature of the plan provided or contemplated by the act.

In the Income Tax cases, above referred to, this Court, in its opinion, gave great and controlling importance to the consideration that the omission of these provisions, which were held invalid, would cut off the *largest part* of the revenue which, it was anticipated, would be obtained by means of sections 27 to 37, inclusive.

The omission from the act of March 2, 1893, of sections 11 and 15 would *completely destroy* the plan and purpose of Congress to defray the entire cost of the permanent system of extension by imposing the burden thereof upon the land owners and the District of Columbia.

It is impossible to suppose that Congress would have passed the act with sections 11 and 15 omitted therefrom.

To declare valid and to enforce the remaining sections of the act thus mutilated and changed would be to make a new law not enacted by Congress and plainly inconsistent with the declared will and intention of Congress.

The entire act must, therefore, fail.

VI.

The decrees appealed from should be reversed and the causes remanded to the court below, with directions to proceed in conformity with the judgment of this Court, declaring the whole law invalid.

NATHL. WILSON,
CHAPIN BROWN,
ARTHUR H. O'CONNOR,
Of Counsel.

APPENDIX.

A.

Opinion of the Supreme Court of the District of Columbia holding a District Court of the United States, delivered by Judge Cox:

At the commencement of these proceedings a motion was made on behalf of the owners of some of the ground sought to be condemned that the jury be discharged and the proceeding dismissed.

It was understood then that the motion should be overruled *pro forma* in order that the questions made should be carried up by appeal, and the court was not requested to consider them or pronounce any formal opinion.

But since the case was submitted to the jury and a finding has been made by them the questions involved in that motion have again been brought forward, and the court is moved to reconsider them and decide them upon their merits, and to give the same relief that was then applied for.

I have felt bound to entertain this motion, especially as it has seemed to me that we can better appreciate the merits or defects of the law under which we are acting, now that we have seen something of its practical operation, than we could beforehand.

Without examining in detail the motion which was filed at the beginning of this proceeding, which was quite voluminous, it is sufficient to say that the substance of the grounds set forth in it is that the act of Congress under which this condemnation is made is unconstitutional because it provides for taking private property for public use without providing for just compensation to the owners, as the Constitution requires.

The act of Mar. 2, 1893, under which this proceeding was initiated, requires the Commissioners toprepare in

sections a plan for the extension of a permanent system of highways over the District of Columbia, and when the plan as to any section is adopted they are directed to cause a map of the same to be made showing the boundaries and dimensions of the streets, avenues, and roads, and when the map is approved by a commission created by the act it is directed to be recorded. Within thirty days after it is recorded the Commissioners are required to apply to the supreme court D. C. to condemn a permanent right of way for the public over all the land lying within the highways laid out by the Commissioners and indicated on the map *in any existing subdivision*, which is not already dedicated to the public or owned by the U. States or Dist. of Columbia. In the proceeding for the condemnation it is directed that when the use of only part of a parcel is condemned the jury, in assessing damages therefor, "*shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly.*" In another form they are directed to state as to each parcel of land involved in the proceeding "only the amount of compensation, less the benefits, if any, which it (they) shall award in respect thereof."

When the damages to be awarded for each highway or part thereof are ascertained one-half of the amount is to be assessed upon the land benefited by the highway and the other half is to be charged to the general revenues of the District, and the amounts thus assessed against the property benefited are to be a lien on the property and to be collected like special improvement taxes.

It will thus be seen that the subject of *benefits* is twice introduced in the law. If when part of a lot is condemned and taken the remaining part is to derive a special and peculiar benefit from the proposed improvement, as, for example, where from fronting on a narrow alley it acquires instead a front on a spacious avenue, whereby its value is greatly increased, that advantage or benefit is to be valued, and its value is to be deducted from the amount awarded as compensation for the ground taken and for any incidental damage occasioned thereby, or if the benefit equals the damages it is to be

set off against and satisfy them. On the other hand, that general benefit which all the property in the neighborhood derives from the existence of a new and convenient avenue, though it may not abut upon the avenue, is not to be considered in making the award for the ground taken, but an assessment for this general benefit is to be made on all the property which experiences it. The deduction for benefits is referred to the power of eminent domain. It is, in effect, part payment of the compensation, to be made to the owner. He is paid, partly it may be, in cash, and partly by the benefits conferred upon his remaining property. The assessment for general benefits, however, is the exercise of the power of taxation; and there seems to be no doubt about the power of a legislature to levy taxes in this form. As the Supreme Court of the United States say in Spencer *v.* Merchant, 125 U. S., 356:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement and to order it to be assessed, either, like other taxes, upon property generally or only upon the lands benefited by the improvements, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefited is entrusted to commissioners the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much, but the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

But when we approach the subject of the *deduction* of benefit we encounter the most vexed question in this branch of constitutional law. We are not to expect much light upon it from the decisions of the Federal courts because the Government of the United States has had little occasion to condemn property for public use outside of the District of Columbia, and I am not aware that in the rare instances that have occurred this question has ever arisen.

But in the State courts the decisions are innumerable and irreconcilable. In some the subject is regulated by constitutional or statutory enactment in different ways; in others it is determined differently by the courts upon general principles.

In some States special benefits are allowed to be deducted, not from the ascertained value of the land taken, but only from the incidental damages allowed in addition to that; in others—but this is generally, perhaps, statutory—there can be no deduction for benefits at all. In others, again, both special benefits and the general benefits shared in common with the neighborhood or locality can be deducted. In others, again, the special benefits can be deducted from both the ascertained value of the land taken and the incidental damage occasioned by the taking. It would be utterly useless to attempt a review of the authorities, and I do not see how I can do better than acquiesce in conclusion of those eminent commentators, Judge Cooley and Judge Dillon, that the weight of authority in the State courts favors the last-mentioned view, viz., that the special benefits to an individual lot of which a part is condemned can properly be set off against or deducted from the amount found due as the value of the land appropriated and as special damage to the remainder of the tract or parcel. (Cooley, Con. Lim., pp. pp. 698 to 702; Dillon, Mun. Corp., sec. 625.)

But this does not relieve us of the difficulty. The question still remains: What kind of benefit may thus be set off and deducted, and how is it to be ascertained?

It is agreed on all hands that the land taken is to be paid for at its present value, not according to the value determined in the future by the contemplated improvement—Mills on Eminent Domain, sec. 174; Lewis

on Eminent Domain, sec. 480—and common justice requires that any deduction from this for supposed benefits should be for benefits which if not immediately realized should be at least so far present as to be certain and presently ascertainable. A municipality, for example, directs a street to be condemned, opened, paved, and graded, and that the benefits to the remaining property shall be deducted from the damages allowed to the owners for the land taken. Here the benefit is certain and easily estimated, and there may be no hardship in paying for the land partly or wholly in these benefits. In the examination of a great many cases I have found none in which this charge of benefits is sanctioned except where the improvement has been peremptorily directed by law to be made. A street or county road has been directed to be laid out, swampy ground has been directed to be drained and reclaimed, or a bridge to be built, or an existing street widened. The owner of land to be affected by the proposed improvement has all the certainty of benefit which legislative ordinance can give him. The jurors who are to estimate the damages know when the work is to be done and what will be the cost, and can easily estimate the benefit to result from it. There is nothing conjectural, illusive, or problematical about it, and this is the class of cases in which I understand the deduction of benefits to be sanctioned by the authorities.

And this would apply equally to general benefits assessed and special benefits deducted.

Examples of this are the case of People *v.* Brooklyn, 14 N. Y., 419, in which a street was ordered to be opened and paved, and the expense was ascertained to be $20,390.25 and was ordered to be assessed on the property benefited; the case of Livingston *v.* Mayor of New York, 8 Wend., 85, where a street was actually opened by the city, and the peculiar and special benefits were set off or deducted; the case of Genet *v.* Brooklyn, 99 N. Y., 296, where an act was passed for the widening of Sackett street, and the special benefits were required to be deducted from the damages found, and the case of Terry *v.* Hartford, 39 Conn., 286, where a street was actually laid out through a party's lands.

But let us suppose, if so foolish a thing can be con-

ceived of as possible, that Congress should direct the condemnation of land for improvements to be made at some future day and of a character yet to be determined, and require the valuation of the land condemned to be reduced by the possible benefits to the land retained from the mere prospect of undefined improvements in the future. Could that possibly be sustained as just compensation in the sense of the Constitution? There can be but one answer to such a question, and this leads us to the inquiry whether the present case approaches the one supposed or falls within the class before described.

The object of the act of March 2, 1893, is declared to be to establish a permanent system of highways in that part of the District of Columbia lying outside of the cities.

A highway is a road open to the public—a main road or thoroughfare.

To be complete, it must be opened. As the supreme court of New Jersey say in State, Gaines Pros. *v.* Hudson County Avenue Commissioners, 37 N. J. L., 12: "The second meaning which may be given to this expression of 'opening said avenue' is that it denotes the operation of clearing the avenue of obstructions. This is the sense in which the term 'to open,' as applied to the construction of public highways, is used in our road acts. By force of that legislation the surveyors of the highways lay out the road and the overseers 'open' them. The term to open in this connection obviously means to clear away the obstructions in the road." The same term is employed in this statute, as we shall see further on, and with the same meaning, as it seems to me.

But the clearing away of all obstructions to travel is not the only thing involved in the opening of a highway to public use. In the case of Weightman *v.* The Corporation of Washington, 1 Black, 39, from the obligation of the city to defray the expenses of keeping a bridge in repair the supreme court deduced the obligation to guaranty its safety and the liability of the city in damages for an accident resulting from want of repair.

In the case of Barnes *v.* District of Columbia, 91 U. S., 540, because the Board of Public Works, as a branch of the District government, had by law the entire control

of the streets, avenues, &c., and power to make all regulations which they might deem necessary for keeping them in repair, the District was held liable in damages for an accident occurring on the street because it was in an unsafe condition.

The act of June 25, 1874, 18 Stat., 116, transferred to temporary Commissioners all the power and authority of the Governor and Board of Public Works of the abolished District government, with certain exceptions not material to the present question.

In addition to that, it provided that an engineer officer should be detailed, who should, *subject to the general supervision and direction of the Board of Commissioners, have the control and charge* of the work of repair and improvement of all streets, avenues, alleys, sewers, *roads, and bridges of the District of Columbia.* That control of the *streets of the city* by the Board of Public Works which was held to make the District government responsible for their safety *was hereby extended to all the roads* in the District, so that there could hardly be a doubt that the District was thereby made a guarantor of their reasonable safety for travel.

By act of June 11, 1878, 20 Stat., 102, the powers and authority and, consequently, the responsibilities of the temporary Commissioners were transferred to the present government of the District.

So that the idea of a highway involves not only an open and unobstructed passageway for travel, but one of guaranteed safety.

What have we under the present legislation?

A contrast is noticeable between the case where a projected highway does *not* lie within the limits of an existing subdivision and the case where it does so lie, as in the case now before us.

In the former case the Commissioners are only to apply to the court, *when in their judgment the public convenience shall require the opening* of the highway, for the condemnation *and opening* of the same, and then the court is first to hear evidence as to whether the public convenience does *in fact require the immediate opening* of the highway, and if the court shall decide that question in the negative there shall be no further proceeding.

This would be the form of proceeding in which the

authorities before referred to would countenance the assessment and deduction of benefits.

But the provisions referred to are conspicuously absent from that part of the law which governs the present case.

Where the highway to be condemned runs through *an existing* subdivision, no considerations of public convenience as to opening the highway are to govern the Commissioners, but they are required within thirty days after filing their map to make application to the court, not as in the other case, to condemn *and open* the highway, but simply *to condemn* a permanent right of way for the public.

The principal highway in subdivision 419 which we have been so long examining is Sixteenth street. As laid out upon the map, this passes through enclosures and buildings. Until these are removed, it can not be open to use. The Commissioners can not spend a dollar for this purpose without authority of Congress. No such authority is given in this act nor any direction that the street shall be opened. It is not even provided that on any contingency, such as the reasonableness of the award of damages or the appropriation by Congress to pay them, the highway shall be opened, but the law stops at the condemnation of the land, and thus establishes an impassable barrier to any individual improvement without guaranteeing a public one. Until the street is opened no one can use it as a highway and no one could recover damages for injuries sustained in such unauthorized use, so that the lot-owner, by the mere condemnation which the law authorizes, acquires no right to that which is charged to him as the consideration in part for his land, and he has no assurance when, if ever, he will acquire that right. Meanwhile his land is taken from him because he can put it to no use and because the District may take possession of it without paying him for it in money if these special benefits are charged against it.

Congress *de industria* declines to bear any of the expenses of highways outside of Washington and Georgetown, and throws the whole burden on the revenues of the District, so as to make all improvement in that direction contingent upon the condition of the District

treasury, so that the benefit lies in the uncertain future and is conjectural. It may be further remarked, as showing how difficult it is to estimate these conjectural benefits, that no grades have been established for these streets, and therefore it can not be known whether a particular lot will be above or below grade—a very material question to the just ascertainment of benefits, even where benefit is certain to accrue as to time, if at all.

The question then presents itself whether to deduct from or set off against the damages due the owner for part of a lot taken such benefit as above described to the rest of his lot is, to that extent, to pay him that just compensation which the Constitution requires.

It does not seem to me that the State Courts go that far.

No Federal decisions directly upon this point have been cited, nor has the question been directly presented before in this District.

Attention has been called to the Revised Statutes, D. C., which do provide, in section 261, that in the condemnation of land for roads the jury shall *take into consideration* the benefit which the road may be to each owner by enhancing the value of his land or otherwise.

But all this is only to be done when in the first place application is made by residents of the county to have a new road laid out or an old one altered, or when the authorities of the District shall deem it conducive to the public interest *to open* a new road or alter an old one. It contemplated, therefore, the actual construction of roads, in which case the benefit is in sight and not conjectural.

But, although this question has not arisen directly and been decided in the Federal courts, both the Court of Appeals, D. C., and the Supreme Court of the United States have used language which is of weight and shows very plainly what their opinions will be when the question directly arises.

Thus in the case of The District of Columbia *v.* Prospect Hill Cemetery *et al.*, Washington Law Reporter, vol. 23, p. 11, where the benefits were attempted to be set off against damages without any statutory authority to do so, the court, through Morris, J., said:

"Most extraordinary and unjustifiable would it be to levy such an assessment before the proposed improvement was ever begun; and yet this would be the precise effect of an attempt to set off against the just compensation payable for land sought to be condemned for the purpose of a street the *possible* benefits that might accrue to the adjoining land from the opening of such a street. Even if the just compensation payable under the guaranties of the Constitution could be violently construed as payable in land or in the increased value of land or in some *possible or problematical benefit or advantage* or convenience that would inure to a person, it would be in any event payment for present loss *by a mere promise, that might never be realized*, of future advantage. * * * It is not reasonable to pay for land taken for the public use in promises of increased value for the remainder that may have no foundation in fact."

And so, in the case of Monongahela Nav. Co. *v.* United States, 148 U. S., 312, Mr. Justice Brewer, while he repudiates the idea that *general* benefits can be made part of the compensation taken, also cites with approbation the case of Isom *v.* The Mississippi Central R. R. Co., 36 Miss., 300.

There it appeared that the charter of the R. R. Co. authorized it to have land condemned for its road and contained the clause that the jury in estimating the damages shall take into the estimate the benefits resulting to the owners towards the extinguishment of his claim for damages, substantially the same provision as that of the present law.

In that case the court said: "The rule held by this court is this: Under our Constitution the owner of the land is entitled to just compensation for the damage he sustains by the application of his land and property to public use at the time the public make the appropriation of his private property. The value of the property in the market at that time and no other, and the injury then necessarily known to result to the owner as the necessary and immediate consequence of such public use of his property, without reference to the uncertain or remote benefits or disadvantages that may or may not accrue in the future, is what (in legal contemplation) the owner loses. Whatever is *then incapable of definite ascertainment*,

but rests merely on conjecture, possibility, or probability, dependent on the future, can not be taken into the estimate by the rule of just compensation. It can not be just to award compensation for injuries that may never happen, nor, on the other hand, can it be just to compensate *present injury* or deprivation of right by the possible or probable benefits which may result at some future time from what is now an admitted injury. To say that the owner shall be paid at any other time or in anything else than the measure of value known to the Constitution, or that he shall receive more or less than the loss or injury *then* capable of definite inquiry and ascertainment, or that his claim to this compensation shall be extinguished by the probable benefits which in the future may result from the construction of a road which may not be finished in sixteen years (the time limited by the charter) can not by any fair interpretation of the Constitution be regarded as just compensation first made. This provision of the charter, therefore, which requires the 'jury in estimating the damages to take into the estimate the benefit resulting to such owner by reason of such road passing through his land towards the extinguishment of such claim for damages,' is subversive of the rights intended to be secured by this clause of the Constitution, and to that extent is void."

I endorse these sentiments and consider the language of the Mississippi court strongly applicable to the present case. There is no difference in principle between the taking of private property for the use of a railroad and taking it for the immediate use of the State. In both cases it is taken only in virtue of the right of eminent domain, and in both cases the same just compensation must be made. Congress, by the act of 1893, authorizes the taking of private property for public use and attempts to pay for it partly in benefits to be received in the future, and that contingently. It fails to provide for the just compensation required by the Constitution to be made, and is therefore an unconstitutional appropriation of private property which the courts can not carry out. It is unnecessary to decide whether the recording of the map amounts to a taking. It is sufficient that the law purports to transfer the title and put the Government in possession when it has only paid a part of the compen-

sation due, and this is a taking without just compensation.

It was contended in argument that the mere fact of recording the map was a benefit, inasmuch as it established the streets and avenues in the sense of settling their lines and boundaries for all future time, and thus furnished a guide for all future improvements; that this was the benefit intended by the act of Congress and is to be presumed to be the benefit deducted by the jury.

The act will not bear this construction. The jury are to consider, not the benefit which the platting or even condemnation of the land may be, but that which the purpose (or object) of the taking of the land may be, and the object of the taking of the land must be to convert it to actual use and not merely to plat it on the map. Section 11 also must be read in connection with section 15. By the latter the same jury that assess the damages in part by deducting benefits are to assess the general benefits on the land benefited by the *laying out and opening of the highway*, and in doing that they are to make due allowance for any amount that may already have been deducted for the special benefit to what is left of a lot partially taken; but it is plain that the benefits provided for in both sections are of the same kind. As far as their source is concerned they are the benefits to be derived from a completed, established, and opened highway, and not from one merely projected on paper, and as such they are not present, but future and contingent ones. I have no doubt that the jury have endeavored to carry out the law in this sense, and have arrived at the amount of special benefits by deducting the present value of the parts of land left unappropriated from their probable value when these highways are completed and open for use.

If this constitutional question had been pressed before the jury proceeded to act I would have felt obliged to pronounce the law unconstitutional and to arrest all further proceedings under it. If no benefits had been found by the jury there would have been, perhaps, no occasion to raise the question; but as the jury have found a large amount of special benefits to be deducted from the damages ascertained, the inherent vice of the law has been practically demonstrated, and it becomes my

duty to set aside the whole proceeding for the condemnation of the land.

I might stop here, but there are other features in the law as to which some comments are suggested by our experience in this case.

The 10th section of the law provides that one jury may be sworn and one trial had as to all or any of the parcels of land involved in the proceeding, at the discretion of the court.

And section 15 directs that the same jury which shall assess the damages shall also ascertain what property is benefited by the opening of the highway and shall assess one-half of the total amount of damages on the property so benefited.

The jury having been sworn first in relation to subdivision 419 of section 1st, it was at once perceived that if the jury were to consider what property outside of that subdivision would be benefited by so much of the new highway as lies within that subdivision and assess it accordingly, another jury, in passing upon an adjacent subdivision, might in return assess benefits anew upon the lots in 419, and thus the assessments of different juries might overlap and be doubled upon the unfortunate lot-holder. The jury were therefore given to understand that they were to confine their assessment for benefits to this subdivision.

On further consideration it does not appear that this would carry out the law.

If we suppose a spacious avenue to be run through a half dozen subdivisions from the boundary of the city to the boundary of the District, it is evident that the part of the avenue nearest the city is just as certainly, though perhaps not in the same degree, beneficial to the most remote as to the nearest subdivision, because it is equally essential to it and forms part of its means of convenient access to the city; and the benefit of such a highway is not confined to the ground immediately abutting on it, but extends latterally to all the property to which it adds a convenient access to the city. In fact it diffuses itself in every direction until it imperceptively disappears like the ripples in a stream caused by a stone thrown into it; but if a jury are to assess all the property so benefited they must first know the whole amount

of damages to be awarded for all of the property taken for the supposed highway in order that a single assessment for benefits may be made. In order to do this it would be necessary for the same jury to assess the damages in all the subdivisions affected by the highway in question and for all assessments to be suspended until this work is completed, which shows that the assessment for benefits is premature and would in any event have to be set aside.

But, not to speak of the enormous and unreasonable amount of labor that this would devolve upon a single jury, it may be observed that the jury in making such assessment under the present law would be completely at sea, without chart, rudder, or compass.

In some of the States, as appears from cases cited in argument, assessment or taxation districts are created by the law directing these assessments for benefits, as by directing all the property within a certain distance on each side of the highway to bear the expense of it; but here no boundaries are prescribed to the assessors and they are left to wander indefinitely in search of property which may in their judgment be benefited, in however small a degree.

They are first to ascertain what property will be benefited. Then a gross sum, *i. e.*, one-half of the damages found, is to to be charged upon that property, and the jury are to assess upon each lot its "*proper proportional part*" of that sum. By what standard is that proper proportional part to be ascertained? Is the gross sum to be apportioned among the lots according to their street frontage, their area, their existing value, or their probable increased value? It is evident that quite different results might be reached by different modes of apportionment, and yet the law is silent as to which is to govern the jury.

Some very pertinent remarks on this subject were made by the supreme court of New Jersey in the case of State *v.* Hudson County Avenue Commissioners, 37 N. J. L., 12, before referred to. They say: "A legislative act of taxation in order to be legal and effectual must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burden.

This is as essential as the designation of the amount to be raised; and not only the sum required must be stated and the property out of which it is to be made designated, but *also some certain standard of assessment must be established.* No act of *taxation can omit any of these components.*"

The uncertainty on this subject of the present law makes it impossible to get at and carry out the intent of the legislative authority, and has the unavoidable result of making any assessment a matter of guess-work or a purely arbitrary distribution of the burden.

The case calls for another remark.

The recording of the map, by the Commissioners, if nothing is done in pursuance of this step, is only a less injury to the lot-owners than taking their property without paying for it.

The case of State *v.* Hudson County Avenue Commissioners, before referred to, has some features very like the present case.

The commissioners were authorized by a law to open an avenue across the county of Hudson. Among the first acts required of them was that of surveying the route of this road and adopting a location. This was done and then by a writ of certiorari the proceedings were brought before the Supreme Court.

The law intended to provide that the expense should be apportioned between the owners of land proximate to the road, within certain limits, and the public. The law was so confused and contradictory, however, as to the apportionment of the expense that the court held it impossible to carry it into execution, and the question then was whether the survey and location of the road should still stand good.

And the court said, per Beasley, chief justice: "In this respect, it was said, in the first place, that if the road has been properly laid it should not be obliterated or avoided, on the ground that certain subsequent proceedings prescribed in the statute can not be carried into effect; but I can find nothing reasonable in such a position. The project can not be carried through or made in any extent available unless the money necessary for it can be raised. This official survey, brought before us by this writ, is and must remain under the law in its

present state a mere dead letter so far as the public is concerned, but it is and must be a very serious incumbrance upon the property which it traverses. As long as this map shall remain upon the public records, threatening the property which it embraces with the realization of the scheme of which it forms a part, so long there is every reason to believe the property will have its value affected in the market. * * * I do not believe the law will permit a landholder to be held at such a disadvantage. This adopted survey constitutes something very like a conditional lien on this land, and that lien can not, with any sort of justice, be suffered to remain in the illusive anticipation of future legislation."

Accordingly, in that case, the court set aside the entire proceedings of the commissioners, including the recording of the plat of the road.

Had the full effect of the act of 1893 been appreciated before any step was taken to carry it into execution, this case would have been an authority for arresting even the preliminary proceeding of recording the map by certiorari or injunction.

No such question, however, is before me, and I refer to it only as an additional feature of the situation showing the importance of some legislative revision of the law.

W. S. Cox, *Justice.*

B.

Opinion of the Court of Appeals.

Mr. Justice SHEPARD delivered the opinion of the court:

This is an appeal from a judgment in a condemnation proceeding, instituted by the District of Columbia under the provisions of the act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities, approved March 2, 1893.

Before August 27, 1888, there was no law regulating the subdivision of lands outside of Washington and Georgetown, into blocks, lots, streets, etc. Many such were made, however, from time to time, and maps thereof admitted to record. On that day, an act of Congress was approved which authorized the District Commissioners to make and publish regulations concerning such subdivisions, and prohibited the record of any plat thereof without the order of said Commissioners endorsed thereon. The act, in the concluding section, prohibited the record of a plat "unless made in conformity with the general plan of the city of Washington." Some subdivisions were made under this act also.

The act of March 2, 1893, under the title aforesaid, undertook to provide a complete plan for a permanent system of highways throughout the whole of the District outside the boundaries of Washington and Georgetown. This was to be made as nearly in conformity with the street plan of the city of Washington as the Commissioners of the District might deem advisable and practicable. The plans were required to be prepared in sections of such area as the Commissioners might deem necessary, covering, first, such existing subdivisions as are not in conformity with the plan of the city of Washington. The plans were required to adopt and conform to any existing subdivisions made under the act aforesaid of August 27, 1888.

The map of each section, so determined upon by the Commissioners, was required to be delivered to a commission, consisting of the Secretary of War, the Secretary of the Interior, and the chief of the engineers, who were

authorized to adopt the same, or make a new one. The map when finally adopted was to be recorded, and the record of further subdivisions of any land included therein was prohibited. After the record of the map it was made unlawful for the District to improve, repair, or assume any responsibility in regard to any abandoned highway within the area embraced in said map, or to accept, improve, repair, or assume any responsibility in regard to any highway that any land-owner in such area should thereafter attempt to lay out or establish, unless the same, having first been submitted to the Commissioners and found to be in conformity with the map, shall have been approved by them and duly recorded. All land-owners were permitted to adopt the subdivisions of their lands so made, by deed or will, and such adoption was given all the effect of a plat or map made and recorded by them. The Commissioners were authorized to name all streets, avenues and reservations shown on the maps.

Wherever the maps so made and recorded shall alter or dispense with any highway, in their existing subdivisions, the Commissioners are required, within thirty days after record of such map or maps, to file a petition in the supreme court of the District praying the condemnation of all highways and reservations indicated on said map, that had not already been dedicated, etc.

In respect of highways, etc., outside of existing subdivisions, the Commissioners are empowered to institute condemnation proceedings where, "in their judgment, the public convenience shall require the opening of the same, or any part thereof." But the question whether the public convenience does in fact require such opening must also be passed on by the court, and if found in the negative the proceeding must be dismissed.

Ample provision is made for the manner of conducting the condemnation proceedings with notice and formal trial before the court and a special jury of seven disinterested men who shall not be in the employ of the District or of the United States. The sections of special importance in the consideration of this case are 11 and 15, which read as follows:

"SEC. 11. That where the use of a part only of any parcel or tract of land shall be condemned in such a pro-

ceeding the jury in assessing the damages therefor shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately."

"SEC. 15. That the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be one-half assessed against the land benefited thereby and the other half shall be charged up to the revenues of the District of Columbia; that one-half of the amount awarded by said court as damage for each highway or reservation, or part thereof, condemned and established under this act, shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof, and the remainder of said amount shall be charged to the revenues of the District of Columbia. The same jury which shall assess the damages caused by the opening of any highways or reservation, or part thereof, or by the abandonment of an existing highway, or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the whole of said one-half of the damages: *Provided*, That in making such assessment for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, make due allowance for the amount, if any, which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract. The proceedings of the court and the jury in making assessments for benefits under this section shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages, and the verdict of the jury making an assessment under this section as to any parcel of land shall not be conclusive until the same shall have been confirmed by the court. When confirmed by the court, the assessment so made shall be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia

have been collected since February twenty-first, eighteen hundred and seventy-one, and shall be payable in five equal annual instalments, with interest at the rate of four per centum per annum from the date of the confirmation of the assessment by the court. That no expense for the improvement of any street, circle, reservation or avenue laid out under the provisions of this act, outside of the cities of Washington and Georgetown, shall be chargeable to the Treasury of the United States, but such expense shall be paid solely out of the revenues of the District of Columbia."

The foregoing are followed by sections giving appeals, with certain limitations, to the Court of Appeals, from all judgments that may be rendered; and providing how the money shall be distributed among the claimants, etc. Section 18 provides that upon payment of the damages the Commissioners shall have possession, and concludes with the following provision:

"In case the court shall enter judgment of condemnation in any case, and appropriation is not made by Congress for the payment of such award within the period of six months, Congress being in session for that time after such award, or for the period of six months after the meeting of the next Congress, the proceedings shall be void, and the land shall revert to the owners."

The first map made, and known as section 1, was recorded August 31, 1895, and embraces forty-seven independent subdivisions that had been previously made, from time to time, by land-owners. Within thirty days, as required by the law, petitions for condemnation were filed against the owners of lands in each of said subdivisions.

The proceeding in this case covers what is known as Denison and Leighton's subdivision of a part of Mount Pleasant and Pleasant Plains.

A jury was empanelled and returned a verdict in which they describe each lot, giving its area in square feet, the number of square feet taken for public use, and the value thereof, the value of buildings, etc., the damages, where any, to the remaining land, the benefits, where any, to the same, and concluding with the assessment of damages made in each case, less benefits.

Upon motion for new trial, in arrest, etc., based upon the unconstitutionality of the law, the learned justice before whom the proceeding was had, after delivering an able and comprehensive opinion giving the reasons for his conclusion, declared the whole act void, set aside the verdict, and dismissed the petition. From that judgment the appeal has been prosecuted.

1. The first question for decision arises under the eleventh section of the act which provides the manner of the assessment of damages where a part only of the owner's tract shall be taken. The jury are therein directed, in assessing the damages for the part taken, to consider also the benefit that "the purpose for which it is taken" may be to the owner by enhancing the value of the remainder.

In the recent case of Md. & W. R. R. Co. *v.* Hiller, 24 Wash. Law Rep., 249, which was a case of the condemnation of land for the use of a private corporation, we were compelled to give interpretation to the last clause of the fifth amendment: "*Nor shall private property be taken for public use without just compensation.*" And the majority of the court were of the opinion that this "just compensation" means the actual value of the property taken payable in money, and without diminution on account of benefits general or special. In respect, however, of a claim for damages done to the adjacent land, not actually taken, special benefits are to be considered.

The same rule must necessarily apply where the appropriation is for the use of the Government. There is no ground for a distinction. However, it must be admitted, as pointed out in the case before referred to, that there is, in some material respects, a difference between the effect of condemnation of land for a railroad and for a public highway or street. In the former, the use of the taker is practically exclusive, whilst in the latter case the owner, as one of the public, has the enjoyment of all the uses of the thoroughfare, and has, besides, a special easement, or property, therein, for the subsequent deprivation of which, under certain circumstances, he may also be entitled to compensation. Whatever weight these considerations may be entitled to, they were not provided for in the fifth amendment as they have been

in some of the later State constitutions; and whilst Congress may liberalize or extend the benefits of special compensation to the land-owner it can not restrict the operation of the words of the Constitution intended for his protection.

The difference between the effect of taking for a *quasi* public and a distinctively public use, we venture to suggest, accounts for the doctrine of some of the decisions wherein, as it seems to us, the exercise of the sovereign power of taxation, that may include the assessment of special benefits to pay or assist in paying for streets and their improvement when taken, has been confounded with the separate and distinct right of eminent domain.

Both these powers are sought to be exercised in the statute under consideration. Section 15, which provides for the assessment of part of the cost of the land upon the property in the neighborhood receiving benefits from the opening of the street or streets, will be matter of special consideration later.

Section 11, which regulates the condemnation, provides that the value of the part taken from an owner may be reduced by the benefits which may accrue to his remaining land. Where these benefits are found to equal or to exceed the value of the part taken, there is nothing left for which to assess the neighboring lands under section 15. The whole burden falls upon the one land owner, notwithstanding the lands of others may receive benefits of the same kind to an equal or less extent. If the compensation, or "damages" as we think it is misnamed in the act, exceed the benefits, then the owner may be further assessed in proportion with others to make up the amount thereof, under the provisions of section 15. It is true that by special provision of that section the jury is required to make "due allowance for the amount, if any, which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract." Exactly what this "due allowance" may mean is unimportant. In its broadest application it is eminently just; but it is given as an act of grace, and is not the compulsory recognition of a right. If the power to consider these benefits exists in the award of just compensation in the exercise of the right of eminent domain, it is dependent upon nothing else.

Payment of the surplus may be made from the public revenues, or in part from a fund provided by special assessments upon all neighboring lands that are benefited by the improvement, in the discretion of Congress. This power of special assessment may be made to operate concurrently with the other, or it may follow it or be called into existence by a later independent act; and in case of its exercise, there would seem to be no way in which, save by legislative favor, the owner could secure exemption from double assessment.

Granting the power to assess the cost of the improvement against lands benefited thereby, then if the provision requiring credit to the owner of the land taken for benefits assessed against him under section 11 had been omitted therefrom, it could hardly be rendered invalid thereby.

The plea of double assessment would be met with the answer that the first one was made, not as an assessment of a tax, but under the separate and distinct provision of the fifth amendment, regulating compensation for lands taken for public use.

Had the power to assess and set off benefits been excluded from section 11, or had section 15 been amalgamated therewith and the owner of the land taken merely included with other neighboring land-owners in an assessment, in proportion to benefits, for the purpose of raising a fund to aid in paying the cost of the improvement, the foregoing objection might probably have been obviated; because, whilst the two proceedings would be had together, the assessment and payment of compensation, on the one hand, and the assessment of the cost of the public improvement on the other, would have been separate and distinct operations.

Referring to the case of Md. & W. R. R. Co. *v.* Hiller, *supra*, where the reasons for the interpretation given the language of the fifth amendment limiting the exercise of the right of eminent domain are set forth, our conclusion is, that so much, at least, of section 11 as provides for the diminution of the just compensation for the value of the land taken to the extent of benefits accruing to the remainder, is beyond the power of Congress, and therefore void.

It does not follow, however, that the whole section shall be declared void and stricken from the bill because of the attempt to exercise a power that Congress does not possess; for, as if in recognition of a doubt as to its possession of such power, it is further provided that the assessments of value and of benefits should be separately made and returned by the jury. Although the word "*may*" is used in that provision, and not *must* or *shall*, we think the context authorizes it to be regarded as imperative rather than permissive only.

In Md. & W. R. R. Co. *v.* Hiller, *supra*, the trial court, without any direction upon the point in the law, required the jury to make a separate assessment; and upon return of the verdict, ignored the assessment of benefits and entered judgment for the value as found; and that judgment we affirmed. We see no reason, therefore, why the remainder of the section may not stand, with the whole provision as to benefits stricken out. It is plainly severable therefrom. Huntington *v.* Worthen, 120 U. S. 97, 102.

2. Notwithstanding the criticism contained in the opinion of the majority of the court in the recent case of Craighill *v.* Van Riswick, 24 Wash. Law Rep., 177, of the doctrine that special assessments for benefits received may be made in aid of public improvements, it was conceded that it had been established by the great weight of judicial decision in this country, as well as recognized to exist by the Supreme Court of the United States.

In that case, too, a marked difference was referred to as existing between assessments for the creation of public pleasure grounds and for the improvement of streets, building sewers, etc. As was said by Mr. Justice Morris:

"The theory has its limitations and restrictions, as has the power of general taxation; and we think that it will be found, upon a closer analysis of the authorities, at all events of the best authorities upon the subject, that the theory has been applied only when some easement or appurtenance has been added to the lands of the person assessed, or when some advantage has been given him which he did not possess before, such generally as the improvement of a street for access to his property or the construction of a sewer for the drainage of his land, or

some similar work which he could, and should have done for himself, if it were not that such work by a private individual, for obvious reasons, would be impracticable."

Some of those special easements and rights of property in the streets, involved in this proceeding have been mentioned heretofore.

In so far as the general principle of the assessment, established by section 15 of this act is concerned, there can be no substantial objection. It is fair, liberal and regular. One-half only of the cost, and that payable in five annual installments, is to be assessed against the property found to be benefited by the improvement, in proportion to the benefits by each tract received. The benefits are not apportioned by an arbitrary rule of frontage, area or neighborhood; but are to be ascertained by a jury under the direction and supervision of a competent court, with the same right of appeal as in other cases.

Any mode of arriving at the assessment of benefits, however, must to a certain extent be arbitrary, uncertain and unequal in operation; but these difficulties are inherent, and though furnishing strong reasons against the adoption of any such system of taxation, have not as yet been permitted to stand in its way.

The difficulty with section 15, in these respects, is not in the general principle of the assessment, but in giving it certain and effective operation in connection with other provisions of the act. For this reason, chiefly, the learned justice who tried the case set aside the verdict and declared the law inoperative and void. As was said in his opinion: "If we suppose a spacious avenue to be run through a half dozen subdivisions from the boundary of the city to the boundary of District, it is evident that the part of the avenue nearest the city is just as certainly, though perhaps not in the same degree, beneficial to the most remote as to the nearest subdivision, because it is equally essential to it and forms a part of its means of convenient access to the city; and the benefit of such a highway is not confined to the ground immediately abutting upon it, but extends laterally to all the property to which it adds a convenient access to the city. In fact it diffuses itself in every direction until it imperceptibly disappears like the ripples in a stream caused by a stone

thrown into it; but if a jury are to assess all the property so benefited they must first know the whole amount of damages to be awarded for all the property taken for the supposed highway in order that a single assessment for benefits may be made. In order to do this it would be necessary for the same jury to assess the damages in all the subdivisions affected by the highway in question, and for all assessments to be suspended until this work is completed."

The act does not contemplate the immediate opening up of all the streets provided for in the map; but that it shall be done first in the old subdivisions separately, and then in the outlying portions, from time to time. Section 6 seems to contemplate an immediate but separate proceeding to condemn, against the property in each of the subdivisions, and that course has been pursued by the Commissioners. Section 7, on the other hand, defers the condemnation of streets and avenues in other portions of the District contained in the map, and outside of existing subdivisions, until such time as, in their judgment, public convenience shall require, and this exercise of discretion is made subject to review by the court. These requirements seem to have been ignored in section 15, which seems to contemplate an award of benefits on all lands benefited by opening up any particular highway. So, as said by Mr. Justice Cox: "If the jury were to consider what property outside of the subdivision would be benefited by so much of the new highway as lies within that subdivision and assess it accordingly, another jury, in passing upon an adjacent subdivision might in return assess benefits anew upon the lots in this subdivision, and thus the assessment of different juries might overlap and be doubled upon the unfortunate lot-holder." In the same way assessments might be further made to overlap in the later opening of a street to the District boundary.

The other sections of the act show that Congress regarded it as unwise to open a street to the District line sooner than the public convenience shall demand; whereas, it was considered important to at once rectify the existing subdivisions and conform them to the general plan. These were partly built upon and would probably be further incumbered by improvements, with

a probable rapid increase of values and consequential damages to be compensated for.

In our opinion, section 15 is inoperative by failure to conform to the necessary operation of sections 6 and 7. To accomplish the object of speedy condemnation and rectification of streets in localities where important, some provision should have been made for the creation of definite taxing districts, including one or several subdivisions and sections adjacent, where it might appear to be expedient and just, so that the work of condemnation, laying off, and assessment of expenses of streets could take place promptly without complication with others.

Another defect is that the assessments, when confirmed by the court, shall bear interest from date of such confirmation, notwithstanding the fact that Congress may not accept them, if at all, for a year, possibly, under the provisions of section 18.

3. That Congress has made no appropriation for the immediate payment of the compensation that may be assessed does not render the act invalid. That it had the right to authorize the Commissioners to withdraw, after judgment rendered in a similar proceeding where the money had been appropriated in advance, has been decided. Ross *v.* U. S. *ex rel.* Prospect Hill Cemetery, 24 Wash. Law Rep., 98.

Here no appropriation is made; but it is declared that in case it is not made "within the period of six months, Congress being in session for that time after such award, or for the period of six months after the meeting of the next session of Congress, the proceedings shall be void and the land shall revert to the owner."

The last words are meaningless, for the title can not pass out of the owner until payment made or security provided for. (Sweet *v.* Rechel, 159 U. S., 380, 401, 404.) Besides, the first clause of the section prohibits the possession of the Commissioners for the District until the appropriation shall have been made and the money actually paid.

It is a serious inconvenience, and may in some instances result in injury to the private owner that he may have to remain in suspense awaiting the appropriation

by Congress; but this is an incident of the exercise of the power that can not be wholly avoided, and against which there is no remedy, provided it be not prolonged for an unreasonable period. (Shoemaker *v.* U. S., 147 U. S., 282, 321.)

The same practical injury may follow the institution of proceedings by a private corporation as the result of protected litigation; though, in such case, the landowner would probably have a right of action for actual damages against the corporation in the event of its withdrawal therefrom.

4, The next proposition urged in support of the judgment is, that if the invalidity of either of sections 11 and 15, or both, be established, the act, as a whole, becomes inoperative, and must therefore be declared void.

We can not agree to this contention. The controlling object of the act evidently is to provide a uniform plan for the extention of the streets and avenues of the city of Washington throughout the District of Columbia, and to rectify all existing subdivisions and bring them into conformity therewith. (Ross *v.* Goodfellow, 23 Wash. Law Rep., 385.)

Even if the whole of section 11 had been declared void the general object of the act would not be impaired, though important to the public interest in giving immediate effect to the operation of the act in the existing subdivisions, it might have been omitted along with its attendant provisions, without detriment to the general object to be accomplished.

What has been said of section 11 applies with greater reason to section 15, which has been declared invalid. That section might well have been omitted altogether. It is but one of the modes in which the property condemned may be in part paid for. If in fact the policy of assessing benefits in order to pay for the opening of streets is to be generally pursued, it would be more nearly just, as well as conducive to certainty of ascertainment, if the assessment should be made to follow upon the actual condemnation and opening of the street through a definite territory.

"It is only when different clauses of an act are so dependent upon each other that it is evident the legislature

would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency the act will stand, though different parts of it are rejected." (Huntington *v.* Worthen, 120 U. S., 102; Packet Co. *v.* Keokuk, 95 U. S., 80, 89; Poindexter *v.* Greenhorn, 114 U. S., 270; Reagan *v.* Farmers' L. & T. Co., 154 U. S., 362, 395.)

5. The next and last objection taken to the act, as a whole, is that the record of the maps provided for therein amounts to a taking of the land, in the sense that it interferes with the enjoyment thereof by the owners to an injurious extent, beyond the power of Congress; without a provision for compensation. This question, though not decided, was to some extent considered in Ross *v.* Goodfellow, *supra*, where some of the probable inconveniences of the act were alluded to.

That the act is not an unauthorized encroachment upon the rights of the land-owners is, we think, settled by the principles announced by the Supreme Court of the United states in the following cases: Shoemaker *v.* U. S., 147 U. S., 282, 321; Prosser *v.* North. Pac. R. R., 152 U. S., 59, 63, 65.

Similar statutes are quite common throughout the States of the Union, and have generally, if not universally, been upheld as valid exercises of legislative power. District of City of Pittsburg, 2 W. & S., 320; Moale *v.* Baltimore, 5 Md., 322; Steuart *v.* Baltimore, 7 Md., 508; Foster *v.* Scott, 136 N. Y., 575, 577.

The question whether the public necessity, or interest intended to be subserved by the act so far exceed its inconveniences to the individuals as to justify its enactment, was one for the determination of Congress.

Whilst we concur with the learned trial justice in his refusal to enter judgment in accordance with the verdict, we think that he went too far in declaring the whole act inoperative and void and dismissing the petition. The judgment will therefore be reversed, and the cause remanded, with direction to modify the judgment in so ar as it dismisses the petition, and to reinstate the cause for further proceeding therein not inconsistent with this

opinion. The costs incurred on this appeal by the parties respectively will be paid by them.

It is so ordered.

Mr. Chief Justice ALVEY filed an opinion dissenting in part from, and concurring in part with, the opinion of the majority of the court, as follows:

This proceeding was instituted under section 6 of the act of Congress of the 2d of March, 1893, entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," for the purpose of having condemned permanent rights of way for the public over all the land lying within the limits of a certain existing subdivision in section 1 of the plan for the extension of a permanent system of highways in this District, as provided for and directed by said act.

The plan for extension of this section 1 has been made and recorded in pursuance of the statute; and proceedings for condemnation and assessments were instituted and carried on to the extent of the findings by the jury under the direction of the court. But, at this stage of the proceeding, exceptions were taken to the proceedings, presenting questions as to the constitutionalty of the statute, and as to the power of the court to proceed thereunder. These exceptions were sustained by the court, and the entire statute, and all the proceedings had thereunder, were declared null and void, and the proceedings for condemnation and assessments were dismissed.

The grounds for this decision are supposed to be apparent in the eleventh and fifteenth sections of the statute. There is certainly no sufficient ground for contending that any of the other sections and provisions of the act are amenable to constitutional objection. The most that can be urged against some of them is, that they may give rise to difficulties in their practical application. But this grows out of the nature and peculiar circumstances of the subject-matter of the act, and not out of any constitutional prohibition applicable to the case.

Section 11 of the act provides, "that where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury in assessing the

damages therefor shall take into consideration *the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same*, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately."

By section 15 it is provided, "that the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, *shall be one-half assessed against the land benefited thereby*, and the other half shall be charged up to the revenues of the District of Columbia; that one-half of the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof, and the remainder of said amount shall be charged to the revenues of the District of Columbia. The same jury which shall assess the damages caused by the opening of any highway or reservation, or part thereof, or by the abandonment of any existing highway, or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against *each parcel which it shall find to be so benefited its proper proportional part* of the whole of said one-half of the damages: Provided, that in making such assessments for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, *make due allowance for the amount, if any, which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract.*" The section then provides, that when the assessment so made shall have been confirmed by the court, it *shall be a lien upon the land assessed*, and shall be collected as special improvement taxes in this District have been collected since February 21, 1871, and shall be payable in five equal annual installments, with interest at the rate of four per cent. per annum from the date of the confirmation of the assessment by the court. This section further provides, that none of the expense for the improvements contemplated by the act "shall be chargeable to the Treasury of the United States,

but such expense shall be paid solely out of the revenues of the District of Columbia." It is then provided, by section 16 of the act, "that when said court shall have assessed the damages to be paid as to any parcel of land the use for which shall have been condemned, or which shall have been injured by the abandonment of a previously existing highway, and there shall be no controversy as to the persons entitled to receive the same or as to the distribution of the same among them, said court shall decree such payment to be made, and upon presentation of a duly certified copy of such decree to the Treasurer of the United States, he shall report the same to Congress for consideration and action, and shall make such payment to the person or persons appearing by such decree to be entitled thereto, as Congress may provide." And by section 18 it is provided, "that whenever any final decree shall have been made by the court under the provisions of this act for the payment of the damages to the parties, or into the registry of the court, *and when the money has been appropriated and paid*, the Commissioners shall be entitled to take immediate possession of the parcel of land in regard to which said order of payment shall have been made, and the court shall enforce such right of possession by proper order and by process addressed to the marshal of the United States for the District of Columbia. In case the court shall enter judgment of condemnation in any case, and appropriation is not made by Congress for the payment of such award *within the perid of six months*, Congress being in session for that time after such award, or for the period of six months after the meeting of the next session of Congress, *the proceedings shall be void*, and the land shall revert to the owners." That is to say, the condemnation proceedings shall be void, and the land remain as if it had never been condemned. The owner, therefore, is not to be, and, indeed, could not be, deprived of his land until compensation therefor is actually made, and if such compensation be not made within the reasonable time fixed by the statute, the condemnation proceedings are to be treated as wholly without effect.

1. The first question to be considered is, what will constitute just compensation for private property taken for public use, to gratify the requirement of the fifth

amendment to the Constitution of the United States? This question is raised by the eleventh section of the act under consideration, which provides that where the use of only a part of any parcel or tract of land is taken for the improvement proposed, the benefit, if any, that may accrue therefrom to the remaining part, by which its value may be enhanced, shall be taken into consideration and allowed for in estimating the amount of just compensation for the part taken. This would seem to be fair and just, and is certainly supported by the great preponderance of authority in this country. Indeed, this is conceded by the learned justice below, upon the authority of Cooley on Constitutional Limitations, page 700, and Dillon on Municipal Corporations, sec. 625. The property is taken for public use by virtue of the power of the eminent domain; and the question is, whether the owner of the land taken can exact full compensation therefor in money, *eo nomine*, irrespective of any and all special benefits conferred upon the remaining part of the tract or parcel of land left to him, by the use of the part appropriated by the public?

The learned justice below, while conceding the existence of the general principle by which benefits may be assessed, yet concluded that there was such difficulty in ascertaining the benefits with certainty and precision, and such uncertainty as to the time when such benefits would actually accrue to the remaining parts, that the provision for assessing such special benefits was null and void, and could not, therefore, be enforced. If this be the true construction, it necessarily strikes from the act the entire section 11, and leaves no provision for assessing special benefits as means of compensation. But I do not think such construction ought to be adopted. Every reasonable intendment should be indulged in order to maintain the act in its entirety, and if there be any reasonable mode of construction by which the entire act, and every provision thereof, may be sustained, as against a mere plausible construction tending to a contrary result, the former mode of construction must prevail. It is only when no other reasonable construction can be supported, that an act of Congress, or any part of it, can be declared to be unconstitutional and void, or invalid for any cause.

It has been very earnestly and strongly argued by counsel for the appellees that it is in contravention of the constitutional rights of the parties to allow the special benefits to the remaining parts of their lands to be taken into consideration in estimating just compensation for the parts taken; and many authorities have been cited in support of their contention. But the great weight of authority is against the contention; and it is only in deference to the arguments so earnestly pressed upon the court, that I think it proper to refer to some of the most generally accepted authorities upon the subject.

It is certainly true, as contended by counsel, that what will constitute just compensation for the land taken is a question for the courts, and not for the legislature, to determine. The constitutional requirement of just compensation to be made, excludes the power to take into account, as an element of such compensation, any supposed benefit that the owner of the land may receive in common with the other members of the said community, from the proposed improvement; but he is entitled, as against the public for whose use his property is taken, to receive a full and exact equivalent for the land taken from him, and that is just compensation. It is, indeed, for the legislature to determine what private property may be needed, and when it shall be taken for public use; those being questions, as said by the Supreme Court of the United States, of a political and legislative character; but when the taking is authorized, then the question of compensation is judicial. "It does not rest with the public, taking the property, through Congress or the legislature, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." (Monongahela Nav. Co. *v.* United States, 148 U. S., 327.)

The principle by virtue of which the benefits and the injuries to the remaining part may be considered in estimating the just compensation for the part taken, is very clearly stated and illustrated by Mr. Justice Cooley, in his valuable work on Constitutional Limitations, at page 697, 6th edition. He there says: "When, however, only a portion of a parcel of land is appropriated, just compensation may, perhaps, depend upon the effect which

the appropriation may have on the owner's interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if in consequence it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taken a part, vastly greater than the whole was before, and that the owner is benefited instead of damnified by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public use by the owners of lands, without any other compensation or expectation of compensation than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements, which are supposed to be of peculiar value to the locality in which they are made. But where, on the other hand, a railroad is laid out across a man's premises, running between his house and his outbuildings, necessitating, perhaps, the removal of some of them, or upon such a grade as to render deep cuttings or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risks of incidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation. It seems clear, therefore, that, in these cases, it is proper and just that the injuries suffered and the benefits received by the proprietor, as owner of the remaining portion of the land, should be taken into account in measuring the compensation. This, indeed, is generally conceded; but what injuries shall be allowed for, or what benefits estimated is not always so apparent. The question, as we find it considered by the authorities, seems to be, not so much what the value is of that which is taken, but whether what remains is reduced in value by the appropriation, and if so, to what extent; in other

words what pecuniary injury the owner sustained by a part of his land being appropriated."

The same general doctrine, with ample illustrations, is laid down by Judge Dillon, in his work on Municipal Corporations, vol. 2, secs. 624 and 625; and the author there states the process by which to estimate the benefits or injuries to the remaining portion of the parcel or tract, and how such estimate may affect the question of just compensation for the part taken.

Such, then, being the general principle, founded in justice and fairness, and adopted and asserted by courts and jurists of the highest authority, it would seem to be clear that it is competent to Congress, in legislating for this District, to require the benefits, if benefits there really be, to the remaining parcel of land, where a part only of a tract is taken, to be taken into consideration in estimating the just compensation for the part taken for the improvement, as provided in section 11 of the act of 1893. Whether there be benefits of a nature to be considered, and to what extent, are questions of a judicial character, and are exclusively for the court.

But it is strongly objected, and this objection was sustained by the court below, that the statute, while it authorizes proceedings for condemnation of property required for the improvement, makes no provision for the immediate opening and completion of the improvements from which benefits may be derived to the remaining parts of the tracts or parcels not appropriated. In other words, the benefits authorized to be taken into account, in adjusting the measure of compensation for the parts taken, is too remote and uncertain to form an element in estimating the present value of the land taken. That the owner of land to be affected by the proposed improvement should have all the certainty of benefit which the legislature can give; and the court and jurors who are to estimate the damages should be able to ascertain with certainty when the work is to be done and the cost of it, so that they may easily estimate the benefit to accrue therefrom, and that there should be nothing left to conjecture or speculation.

This objection does not seem to be well founded, when all the provisions of the statute are taken into view. In construing this statute, we must bear in mind

the great object and purpose intended to be accomplished. The object to be accomplished is the extension of the present city limits, so as to conform to the original plan of the city of Washington, as projected by President Washington and those intrusted with the adoption of a plan and the laying out of the national city. The plan, while originally confined to a limited portion of the territory ceded by the State of Maryland, yet contemplated the ultimate extension of the city to the limits of the cession, if that should be found necessary. This extension of the city limits is a work of large and extensive proportions, and can not be accomplished all at once, or within any very short time, but must, in the nature of the work, be done gradually as the public needs may require the improvement. Of this fact all land-owners within the District must be taken to have knowledge. The plan of extension is intended to subserve a great public object, indeed, necessity, and also to promote the private interests of property holders along the lines of improvement. That some delay and inconvenience to adjoining proprietors may occur, are consequences that may reasonably be expected ; but the plan of extension should not be defeated, because some persons may suffer inconvenience, or even be made to suffer some consequential loss by the improvement projected or constructed. The statute has carefully provided the means by which the rights of individuals shall be protected in assessing benefits and estimating just compensation under section 11. The question whether benefits are too remote and contingent to be made an element in estimating just compensation, must be decided according to settled principles of law: and none that can not be ascertained with reasonable certainty and precision will be assessed. Remote, contingent, or speculative benefits will not be assessed. The whole subject-matter is placed under the immediate direction and supervision of the court, and we are not to suppose that any benefits will be allowed to be assessed that are not justified by settled principles of law. There is, therefore, no reasonable ground for the apprehension of injustice by reason of the uncertainty of the benefits that may be assessed under section 11 ; nor is there any reasonable ground for apprehension of injury occasioned

by delay after condemnation had and judgment thereon. Section 18 of the statute furnishes ample guard and protection against any such injury occasioned by delay in the payment of the money awarded on condemnation; and it is fair and reasonable to presume that the Commissioners will proceed in opening and making the streets and avenues without unnecessary delay, after condemnation and payment for the right of way; especially as they are forbidden, after the recording of the map of the plan of extension, "to improve, repair, or assume any responsibility in regard to any abandoned highway within the area covered by such map." And the act, by express terms in its second section, provides that, "in order to enable the Commissioners to proceed *speedily and efficiently* to carry out the purposes of this act," they are authorized to appoint commissioners to supervise and direct the execution of the work. No unnecessary delay, therefore, is contemplated, and none should be presumed as likely to occur.

2. With respect to the fifteenth section of the act, different considerations are presented. The power of assessment for benefits attempted to be delegated by that section, in order to raise the one-half of the cost of the improvement, can only be exercised by virtue of the taxing power of the Government. The authority attempted to be given by the act is, that of the amount awarded by the court as damages for each highway or reservation, or part thereof, condemned and established under this act, there shall be one-half assessed against the land benefited thereby, and the other half shall be charged up to the revenues of the District of Columbia. This power of assessment for benefits, as given in this section of the act, is without territorial limitation, and may extend into other subdivisions, and the same lots or parcels of land may be subject to assessments by other juries thereafter called upon to make assessments upon land benefited. This would be contrary to justice, and would contravene an established principle of such local assessments. Such assessments should be so apportioned and levied as to produce uniformity in the burdens imposed thereby, within the taxing district, as nearly as possible. Judge Cooley, stating the result of all the well-considered cases upon the subject, says, that, "as to all taxation appor-

tioned upon property, there must be taxing districts, and within these districts the rule of absolute uniformity must be applicable. A State tax is to be apportioned through the State, a county tax through the county, a city tax through the city; while in the case of a local improvement benefiting in a special and peculiar manner some portion of the State, or of the county or city, it is competent to arrange a special taxing district, within which the expense shall be apportioned." Const. Lim. 610. Again, the author says: "Even within this district the assessment is sometimes made by some other standard than that of value; and it is evident that if it be just to create the taxing district with reference to special benefits, it would be equally just and proper to make the taxation within the district have reference to the benefit each parcel of property receives, rather than to its relative value. The opening or paving of a street may increase the value of the property upon or near it; and it may be just that all such property should contribute to the expense of the improvement; but it by no means follows that each parcel of the property will receive from the improvement a benefit in proportion to the previous value. One lot upon the street may be greatly increased in value, another at a little distance may be but slightly benefited; and if no constitutional provision interferes, there is consequently abundant reason why the tax levied within the taxing district should have reference, not to value, but to benefit." *Id.* 612.

The question of special benefit, and the property to which it extends, is clearly one of fact. And being a question of fact, the legislature may commit to commissioners the ascertainment of the sum to be assessed, and the district within which the assessments shall be made. But it is not bound so to delegate the power to determine these questions; it may determine both of such questions for itself, and when so determined the decision is final and conclusive. (Spencer *v.* Merchant, 125 U. S., 345.)

In this case, while the act, by its fifteenth section, provides that one-half of the amount awarded as damages for each highway or reservation, or part thereof, condemned and established, shall be assessed against the

land benefited thereby, it entirely fails to define or prescribe the district or territory within which the benefits may be assessed. Whether confined to the particular subdivision in which the highway or street may be condemned and established, or whether such benefits may be assessed against land beyond the limits of such subdivision along the line of such improvement, as extended into or through adjoining subdivisions, the act is entirely silent. Nor is there any provision conferring authority upon commissioners, or upon the court, to define such taxing district. And the act wholly fails to provide how the assessment shall be apportioned—whether with reference to the existing value of the land, or to the amount of benefit only that may be derived from the improvement when made. The omission of these essential provisions renders the power of assessment, under this fifteenth section, impossible of execution, according to settled principles of law. The provision authorizing the assessment under the fifteenth section, is entirely too indefinite and uncertain to furnish a reasonable and safe criterion for assessing the one-half of the award of damages against the property supposed to be benefited. This omission or defect in the act, however, does not render invalid the entire act. The particular provision is nugatory for the want of certainty; but all the other provisions of the act are valid, according to my opinion. The defect in the act can easily be removed, by an amendatory act of Congress.

By the order of the court below dismissing the proceedings, it is recited, that, upon argument, "it appearing to the court that the act of Congress under which this proceeding is instituted, is unconstitutional and void, for the reasons stated in the opinion of this court filed, it is ordered and adjudged by the court, that the verdict rendered herein by the jury, be and the same is set aside, and that the petition herein is hereby dismissed."

This order, in my opinion, should be reversed, and the cause be remanded to the court below, so that the verdict of the jury may be set aside, and that the appellants be allowed to move for such other and further proceedings in the premises as they may be advised to be proper.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 633.

BUTLER F. ABBOT, APPELLANT,

vs.

JOHN W. ROSS, GEORGE TRUESDELL AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No. 634.

JOHN W. ROSS, GEORGE TRUESDELL AND CHARLES F. POWELL, COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

APPELLANTS,

vs.

CHARLES H. ARMES, MARY B. ARMES, FRANK L. AVERILL, BUTLER F. ABBOT ET AL.

Appeals from the Court of Appeals of the District of Columbia.

BRIEF FOR ARMES AND OTHERS, Appellees.

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Statement of the Case.

The two appeals in this case involve questions affecting the validity and construction of the act of Congress approved March 2, 1893, entitled: "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities."

The Commissioners of the District of Columbia, having taken the preliminary steps required by said act, filed their petition in the Supreme Court of the District of Columbia praying for the condemnation of the ground required for opening streets in what is known as Dennison and Leighton's subdivision of part of Mount Pleasant, according to the plan made and recorded pursuant to the requirements of said act.

A jury of seven men was empanelled as required by the act, and having heard the testimony, rendered a verdict which is found on pages twelve to seventeen, both inclusive, of the record.

Motions in arrest of judgment, and for a new trial, having been filed by many of the land owners, the court, upon consideration of said motions, held the act to be unconstitutional and void, set aside the verdict and dismissed the petition. The Commissioners of the District appealed from this judgment to the Court of Appeals, and, upon hearing, the latter court reversed the judgment of the Supreme Court of the District of Columbia, and held the act to be valid except the eleventh and fifteenth sections, and remanded the case for further proceedings in conformity with its opinion.

24 Wash. Law Reporter, p. 278.

A decree of condemnation having been entered by the said Supreme Court pursuant to the mandate of said Court of Appeals, Abbot, one of the land owners, again appealed to the Court of Appeals as did also the Commissioners of the District of Columbia, and said decree having been affirmed, both parties appealed to this court, the said Abbot assigning as error that the court below erred in not holding the entire act unconstitutional and void, and the said Commissioners assigning as error that

the court below erred in holding sections eleven and fifteen of said act invalid.

ARGUMENT.

In view of the very full and able argument of counsel for the Commissioners of the District of Columbia in support of the constitutionality of said act, we shall attempt no discussion of that subject in this brief. Our efforts will be confined to an attempt to show that the judgment of the court below, holding the eleventh and fifteenth sections of said act to be invalid, is correct.

We wish to say at the outset that the land owners on whose behalf this brief is filed do not urge the validity of the act in question because of any desire on their part to have their property condemned and taken for the public use as proposed by the said act. The purpose to be accomplished by this act has been a subject of discussion by the District authorities and in Congress for several years, and there can be no doubt that the determination has become fixed and unalterable to establish a system of streets and highways throughout the District in substantial conformity with the original plans of the city. If this act should fail for any reason it would certainly be followed by further legislation having the same object in view. The title of these appellees, and all other persons similarly situated, has been, is now, and will continue to be under a cloud until this matter is definitely and finally disposed of. Since the passage of the act in question all public improvements in this and other similar subdivisions have been practically prohibited, and private enterprise has been almost totally paralyzed. Loss to property owners has already been great, and still greater losses must follow

so long as this project of street extension remains unsettled. It is for this reason that they prefer that this law should be speedily carried into execution, if practicable, rather than suffer the consequences of continued agitation of the subject before Congress and in the courts.

It should be observed that these proceedings for taking land for streets is essentially different from ordinary condemnation proceedings. The purpose here is not to open streets through undivided land where no streets have heretofore existed, but to re-subdivide land already laid out into city squares and lots for the sole purpose of making the streets conform to a different plan. These subdivisions that are now found to mar the symmetry and beauty of the Capital City and which for that reason alone are to be rectified, were laid out, some of them many years ago and some of them more recently, but all of them under and pursuant to the requirement of laws then existing.

The owners of the land dedicated ground for streets, which were opened and improved and which ever since have been maintained and used as public streets, furnishing ample accommodation to all those who have acquired property and established homes there. It is not for the accommodation or advantage of the people who live in these subdivisions that the change in the streets is now proposed, but for the benefit of the people of the whole District, and in a measure of the whole Nation. The streets which were dedicated to the public use are now, to a great extent, abandoned by the provisions of this act, and have become mere private ways, while other land is to be taken instead to gratify a public desire for regularity and harmony in the street system.

Section eleven of said act is as follows:

"That where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding the jury in assessing the damages therefor shall take into consideration the benefit the *purpose* for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately."

Section fifteen of said act provides, in substance, that one-half of the amount awarded for *all* the land condemned under said act (which in this subdivision alone amounts to over $253,000) shall be "charged upon the lands benefited by the laying out and opening of such highway or reservation." The same jury which assesses the damages caused by the opening of the highways is required to determine what property is thereby benefited and to assess each parcel which it shall find to be benefited with its proportional part of the whole of said one-half of said damages. This assessment when confirmed by the court is made a lien upon the land assessed and is payable in five annual installments, with interest from date of confirmation, at four per cent. per annum, and in default of payment of any installment when due the payment is to be enforced by sale of the land.

Thus it will be seen that by the provisions of this act, after the value of the land taken has, under the eleventh section, been diminished by the jury's estimate of the imaginary, problematical and speculative future benefits supposed to accrue to the remainder of the land from the mere "purpose" of the taking, that remainder of the land is to be subjected to a tax lien which may equal or exceed the amount allowed the owner for the land taken.

The scheme presented, therefore, by these two sections of the act is, that the actual market value of the land taken having been ascertained, such market value is to be diminished, first, by the guess of the jury as to the future benefit to the remaining land which the "purpose" (that is the mere legislative idea in passing the act) may afford; and, second, by a tax upon the remaining land to the amount of another guess by the jury as to the future benefit of executive action in carrying out said act in the future, though there is no certainty as to when, if at all, such executive action may take place.

The "benefit" to be considered by the jury is not one to flow from any act to be done, but the benefit they may imagine will accrue from the mere "purpose."

The question arises, then, is this just compensation?

I.

Where only part of a lot is taken for the purpose of a highway, can the benefits which it is estimated will accrue in the future to the part not taken be considered as part of the compensation for the portion of the lot that is taken?

1. It is impossible to reconcile the various and conflicting views expressed on this question by the State courts. The older doctrine, and the one still sustained by the courts of many, perhaps a majority, of the States, is that benefits may be set off against damages and even against the value of the land taken.

Cooley's Const. Lim., 700.

The rule which is regarded in many of the States as the fairest in dealing with benefits and disadvantages is

to allow benefits to be set off against *damages* only, but not against the value of the land actually taken.

Mills' Em. Dom., sec. 158.

In many of the States the right to set off benefits is not allowed in any case whatever. The following are some of the leading cases holding this view:

Isom *vs.* R. R. Co., 36 Miss., 312.
Jacob *vs.* City of Louisville, 9 Dana, 114.
Moale *vs.* Mayor, &c., 5 Md., 314.
Shirley *vs.* B. & O. R. R. Co., 34 Md., 336.
Woodfolk *vs.* R. R. Co., 2 Swan, 422.
R. R. Co. *vs.* Stoval, 12 Heisk., 1.
Jones *vs.* Wills Valley, &c., 30 Ga., 43.
Mayor of Atlanta *vs.* R. R. Co., 53 Ga., 120.
A. & F. R. R. Co. *vs.* Burkett, 42 Ala., 83.
Buffalo, etc., Co. *vs.* Ferris, 26 Texas, 588.
Mitchell *vs.* Thornton, 21 Gratt., 164.
R. R. Co. *vs.* Patton, 6 W. Va., 147.
R. R. Co. *vs.* Wheelan, 11 Neb., 585.
Carpenter *vs.* Jennings, 77 Ill., 250.

It should be observed, however, as a circumstance of considerable significance that in many of the States where the courts have maintained that benefits should be taken into account against the value of property actually taken the rule has been changed by statutory provisions, and in some instances by constitutional amendment.

It is said in some of the cases in which it is held that benefits may be set off against the value of property taken for public use that the execution of a work of great public importance should not be defeated "because some persons may suffer inconvenience, or even be made to suffer some consequential loss by the improvement

projected or constructed." That is to say, the interest of the individual must yield to the interest of the public, and if loss results to him thereby the law affords him no protection or remedy. It is to prevent just such loss to the individual, and to restrain legislatures and courts from inflicting such loss under any pretext whatever, that the Constitution has declared that private property shall not be taken for public use without just compensation.

It is possible that popular clamor for rapid urban growth, a desire to extend city limits and at the same time to avoid the increase of general taxation for that purpose have influenced the courts in the taking of private property for opening streets and allowing benefits, supposed to result to the owner because of the improvement, to be offset against the value of the part taken. Local pride, and what is known as a spirit of progress, a spirit of rivalry between different cities and towns, have, no doubt, impelled legislatures and courts to go to the very verge, if not to overstep the barriers which constitutional provisions have created for the protection of the property and rights of the citizens.

This court in the case of Boyd *vs.* the United States, 116 U. S., 635, says:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional

rights of the citizen against any stealthy encroachments thereon.

"Their motto should be '*obsta principiis.*'"

This language is quoted with approval in the case of Monongahela Navigation Company *vs.* United States, 148 U. S., and that rule of construction was applied in defining what is just compensation for property taken for a public use.

Most of the cases which have come before this court, involving the exercise of the right of eminent domain, have involved only the construction of State statutes and constitutions, in which this court follows the decisions of the courts of the State whose constitution and laws are involved.

Kennedy *vs.* Indianapolis, 103 U. S., 599, which was cited by counsel for the Commissioners in the court below as sustaining their contention, is a case of this character, and does not purport to express the opinion of this court upon the question of what is just compensation to the owner of private property taken for public use under the provisions of the fifth amendment of the Constitution of the United States.

The earliest case in the Federal courts where this question was considered is Van Horn's Lessee *vs.* Dorrance, 2 Dallas, 304. The legislature of Pennsylvania undertook to make compensation for certain lands taken for a public purpose by giving the owners other lands of equal value. It was a case of very great importance, involving several questions of constitutional law in relation to the territorial controversy between the States of Connecticut and Pennsylvania. The court, Patterson and Peters, *JJ.*, says:

"2. The nature of the compensation. By the act the equivalent is to be in land. *No just compensation can*

be made except in money. Money is a common standard by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the act and make it valid; nothing short of it will have the effect. It is obvious that if a jury pass upon the subject or value of the property their verdict must be in money."

The Court of Appeals of the District of Columbia has been called upon to pass upon this question in three cases. The earliest one is Prospect Hill Cemetery Co. *vs.* District of Columbia, 5 App. Cases, D. C., 497, in which the court, at page 518, says:

"Most extraordinary and unjustifiable would it be to levy such assessment before the proposed improvement was even begun. And yet this would be the precise effect of an attempt to set-off against the just compensation payable for land sought to be condemned for the purposes of a street the possible benefits that might accrue to adjoining land from the opening of such street. Even if the just compensation payable under the guarantees of the constitution could be violently construed as payable in land, or in the increased value of land, or in some possible or problematical benefit or advantage or convenience that may inure to a person, it would be in any event paying for present loss by a mere promise, that might never be realized, of future advantages. If these supposed advantages can be made the subject of legislative cognizance otherwise than by enhanced assessment, for ordinary taxation, it is time enough so to make them when the improvement has become an accomplished fact. It is not reasonable or just to pay

for land taken for the public use in promises of increased values for the remainder that may have no foundation in fact.

The next case is the M. & W. Ry. Co. *vs.* Hiller, 24 Wash. Law Reporter, 249, in which the court says:

"The single question presented by the record is this: Can the benefits which the owners may receive through the increased value of the remaining land from the construction of the railroad be set-off against the value of the land actually taken? And its solution depends upon the construction to be given to the last clause of the Fifth Amendment to the Constitution: 'Nor shall private property be taken for public use without just compensation.' * * * * * * *

"But, notwithstanding the admitted preponderance of authority in support of that doctrine (allowing benefits to be offset), we cannot give our adhesion to it as proceeding from a correct interpretation of the meaning of 'just compensation,' as used in the Constitution. After much consideration, our conviction remains that the framers of the Constitution had in contemplation the payment of money, the universal medium of exchange and measure of values, and of that only, as 'just compensation' for property taken for public use."

The third and last case was the District of Columbia *vs.* Armes and others, being one of the cases now under consideration by this court, in which the court below adhered to the principles decided by it in the two former cases, Chief Justice Alvey dissenting.

Washington Law Reporter, Vol. 24, pages 278 to 287.

In the two earlier cases, above mentioned, the statutes under which the condemnation proceedings were had were silent as to the allowance of benefits to the residue of the land in ascertaining the compensation for the

part taken; in the other case—the one now under consideration—the statute, as we have seen, expressly directs the deduction of such benefits, but it is submitted that this makes no difference and can have no weight with the court.

What is just compensation within the meaning of the Constithtion is a question to be determined by the court and not by Congress. Congress has no power to say to the court what is the measure of compensation, or what shall or shall not be considered in fixing that compensation.

> Monongahela Navigation Co. *vs.* United States, 148 U. S., 312, 327.

The legislative declaration, therefore, that supposed benefits are to be taken into consideration by the jury in this proceeding has no effect or weight whatever. If it were legal for the jury to take into consideration the matter of benefits, the court would have so told the jury without legislative action. If it was not legal the court will not do it, even though Congress has required it.

Defining the scope and application of the fifth amendment of the Constitution of the United States, this court in the last case cited, at pages 325–6 says:

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, 'nor shall private property be taken for public use without just compensation.' The noun 'compensation' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former the equivalent for the injury done, and the latter imposed by way

of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property and not for the owner. Every other clause in this Fifth Amendment is personal. No person shall be held to answer for a capital or otherwise infamous crime, etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."

What is a "full and exact equivalent" for the property condemned in these proceedings? Does it consist in benefits which may possibly or will probably, even, accrue in future to the remaining property from the use to be hereafter made of the property taken? Will anyone pretend that the Government can take the land on credit, agreeing to pay for it in the future? Or can it pay part cash and the balance on time without the consent of the owner? Manifestly not. Neither can it pay part cash and part in prospective and conjectural benefits. If it cannot lawfully take land upon an agreement to pay its cash value in a sum certain at a future day certain, how can it pay part cash and part in a benefit uncertain at a future day uncertain? Such a rule would

substitute speculation for certainty, and conjecture for substantial right. The only way to render to the owner "a full and exact equivalent" for his property is to pay for it in money at the time it is taken, and if the use of the property for the purpose for which it is taken shall confer upon other property of the same owner special and peculiar advantages there will then exist a certain, definite and tangible basis upon which to make a special assessment therefor without loss to the Government or hardship upon the owner.

2. If, under some circumstances, special benefits can be deducted from the value of the land taken, are the "benefits" mentioned in the eleventh section of this act such as can be lawfully deducted?

Ordinarily, when land is condemned for a street or for other public improvement, the act which authorizes the taking of the land provides for the opening of the street or the making of the other improvement, so that the owner of the land has the assurance that the benefit which is to result to him from the undertaking will presently accrue. Mr. Justice Cox, in his opinion in this case, says:

"In the examination of a great many cases I have found none in which this charge of benefits is sanctioned except where the improvement has been peremptorily directed by law to be made. The jurors who are to estimate the damages know when the work is to be done and what will be the cost, and can easily estimate the benefit to result from it." (Rec., p. 35.)

The circumstances of this case are such as to distinguish it from all that class of cases in which it has been held by State courts that benefits to the residue of

a parcel of land may be considered in diminution of compensation for the part taken.

The court, in construing this act in respect to the question under consideration, if the doctrine of benefits can be admitted at all, which we deny, must look to the scope and purpose of the act in order to decide whether the alleged enhancement of the value of the remainder of a parcel of ground is or is not so remote as to justify its consideration in determining the compensation to be allowed for the part taken for a highway.

Ruggles *vs.* Illinois, 108 U. S., 72.
Church *vs.* United States, 143 U. S., 457.

The scheme proposed by this highway act is one that, of necessity, will require many years in its execution. The condition of things which the act proposes to remedy is thus stated in the report of the Committee on the District of Columbia when the bill was reported to the House of Representatives by that committee:

"From a point where now exists the bridge over Rock creek at P street to a point at the eastern end of Maryland avenue, a distance of over four miles, the city, as thus laid out by President Washington, was bounded by a highway named Boundary street, commonly called 'the boundary.' No provision was made for the subsequent extension of the city over the remainder of the District or any part thereof until the act of 1888, referred to below. For many years no difficulty was experienced on this account, because the city as laid out was so extensive and the population so small that there was little occasion for laying out streets outside of the limits of the city itself; but about twenty years ago the process of building up the city caused the boundary to be reached and passed. The owners of the land adjoining the boundary from time to time made subdivisions of their land and recorded the same in the books of the

surveyor of the District. Each land owner made a subdivision to suit himself.

"Many of the streets in these subdivisions were narrower than the corresponding city streets. Some of the streets running north and south were laid down as extensions of the existing streets; some were not; generally the diagonal avenues were not prolonged. The cross streets were laid out at various angles. Adjoining subdivisions differed from each other so that a street upon one would have no extension on its neighbor. As the country and city grew it became apparent that Washington at no remote period will practically occupy the entire District, and that the 'Federal city' laid out by Washington will be only the nucleus of the capital of the United States. It was seen that the process of subdivision above described, if allowed to continue, would destroy the symmetry, beauty and usefulness of Washington—that the great and wise purpose of the founders of the city in creating the magnificent plan which President Washington submitted to Congress would be defeated.

"Various remedies were suggested from year to year, and the matter was brought to the attention of the District Committees of the Senate and House of Representatives, but no action was taken in this direction until Congress passed the act of August 27, 1888, entitled 'An act to regulate the subdivision of land within the District of Columbia' (25 Statutes at Large, 451). That act required the Commissioners of the District to make regulations governing the platting and subdivision of lands in the District, and provided that no such subdivision should be admitted to record until approved by the Commissioners, and that no future subdivision of land in the District outside of Washington and Georgetown should be recorded in the surveyor's office 'unless made in conformity with the general plan of the city of Washington.'

* * * * * * *

"Of the features omitted from the act of 1888 the most important is the power to deal with existing subdivisions not in conformity to the plan of the city. The result

has been that in some instances the streets of subdivisions laid out since August, 1888, conforming to the city streets do not join or connect with the streets of subdivisions lying nearer the city proper, which were laid out before that time and which do not conform to the city streets; so there are streets and streets, but no thoroughfare. In other cases, while the streets in the city and its prolongation in the new subdivision are of one width, a part of the same street lying between, within an old subdivision, is narrower. Justice to those who have been required to subdivide their land under the act of 1888 and the regulations adopted thereunder requires that the old subdivisions should be changed so as to conform as nearly as practicable to the plan of the original city and the subdivisions made under the act of 1888. Probably a complete rectification of all the misfitting subdivisions cannot now be made without greater expense than even so desirable a result would justify, but in most cases it is our opinion that the requisite alterations can be made without unreasonable cost.

* * * * * * *

"The object of bringing all these subdivisions into harmony with themselves and the city proper is largely one for the benefit of the whole community. In a considerable degree it is a national undertaking. The main object is to preserve and extend the plan of the city adopted by President Washington; a plan in which streets, avenues and reservations are laid down upon a large scale because they were intended for the grand capital of a mighty nation."

The plat of what is known as "section one," made by the Commissioners under this act, and recorded in the office of the surveyor of the District of Columbia on the 31st of August, 1895, shows that there are forty-seven of the irregular subdivisions in this particular section, and there yet remain three other sections to be platted, in which the number of irregular subdivisions is not known; but if there were only the forty-seven subdivisions of section 1 to be rectified and made to conform

to the plan of the city, and if Congress should make the necessary appropriations to enable the Commissioners of the District to open and improve the streets as soon as the land therefor may be acquired, under the most favorable circumstances it is apparent that the streets in these forty-seven subdivisions cannot be opened and improved for several years.

No street can be opened and improved until Congress shall have made the necessary appropriation to pay for the land taken for that purpose, and also to pay for grading, paving and otherwise improving the streets. It cannot be known what street or streets are first to be opened and improved. The one where land is first condemned may be the last opened. The owner of the land cannot know, and the jury who is charged with the duty of assessing the benefits cannot know, whether the opening or improving the streets is to take place in one or ten years after the condemnation proceedings. Under the terms of the act the condemnation must take place at once. The cases are given precedence over other business of the court. By the proceeding the right of the Government to the land is established, but the improvement of it for a highway is indefinitely postponed. The benefit to the part of the land not taken can only accrue when the street is opened and improved, and by that time the present owner may have been deprived of his property by bankruptcy or other misfortune, and the benefits which he was promised when part of his land was taken will enure to a stranger.

II.

Are the provisions of the fifteenth section of the act valid, which require one-half of the amount of the damages awarded by the court to be assessed against lands which the jury may consider to be benefited?

It is respectfully submitted that this section of the act is one of the very worst samples of this most vicious species of legislation, and that it should be declared invalid for many reasons:

First. The improvement proposed is not local in its character, but is a public improvement, not alone for the city of Washington, but for the whole District and the Nation, and should be paid for by general taxation.

Second. The act creates no taxing district and does not define what lands will be benefited by the laying out and opening of the highways.

Third. These assessments for benefits are to be made without notice to the owners of property against which the assessments are to be made and no opportunity is afforded such owners to be heard as to the amount or validity of the assessment.

Fourth. One-half of the amount of damages awarded by the court is required arbitrarily to be apportioned by the jury which assess the damages caused by the opening of said highways upon the lands benefited thereby, whether the amount so apportioned against a parcel of land be more or less than the benefit accruing to it or more or less than the value of the land itself.

Fifth. These assessments for supposed benefits from the laying out and opening of said highways are to be assessed presently and to be presently due and payable, whether the said highways are ever opened or not, and payment enforced by a sale of the land, while the open-

ing of the highways is not provided for or assured and may never be done.

1. That the proposed improvement in the street system of the Capital City is a public improvement of great magnitude and importance, is apparent upon the face of the act as well as from the report of the committee of Congress which recommended its adoption, and it is a matter of which the court will take judicial cognizance.

Local or special assessments for improvements of this character were elaborately considered by the Supreme Court of the District of Columbia and by the Court of Appeals in the case of Craighill *vs.* Van Riswick, 24 Wash. Law Reporter, 177, 188, in which the assessment feature of the Rock Creek Park act was held to be unconstitutional, and we will only refer to that case upon this point.

2. In respect to the second objection above stated it must be observed that this apportionment of one-half of the damages awarded by the court is to be made by the same jury that assesses the damages for taking the land for the highway. There are liable to be at least forty-seven different juries empaneled to condemn the land in this first section, and hence forty-seven separate apportionments or assessments upon such lands as, in the opinion of each jury, may be benefited by the laying out and opening the highways through the particular parcels of land that may be the subject of condemnation. One assessment would overlap another and the same land would be assessed over and over again.

If the apportionment were to be confined, as in this case, to the land in the particular subdivision, still greater hardship would result to the owner, and the terms of the act would not be complied with, which requires the apportionment to be made upon all the land benefited. It is apparent that the land in the particular

subdivision is not the land which derives the greatest benefit from the proposed plan of street extension. The lands lying beyond the irregular subdivisions to which thoroughfares would thus be opened would receive a much greater benefit.

The apportionment of the damages as required by the act is wholly impracticable and would result in the grossest inequality and hardship.

3. It is beyond dispute that the intent of this act is that all property benefited by the proposed improvement should be assessed by the jury to cover one-half the cost of acquiring the land for the new streets. While the learned justice who presided at the trial of the cases instructed the jury to confine such assessments to the property in the particular subdivision, he subsequently admitted this instruction to have been erroneous, and it is conceded by everybody that the property benefited by the improvement, and therefore liable to assessment, includes property lying without as well as within the subdivisions. It is a question left by the law to the judgment of the jury and certainly they may find that the principal benefit will result to property lying outside of any of these irregular subdivisions.

No one can know, until the jury has performed its duties and rendered its verdict, whose property is to be assessed or the amount of the assessment. No notice is required, personal or by publication, in respect to the property so assessed. No opportunity is given the owner to be heard. A lien is thus fixed upon his property without notice, to be enforced by sale without opportunity to the owner to contest either the validity or amount of the assessment. Thus the owner would be deprived of his property without due process of law.

Scott *vs.* The City of Toledo, 36 Fed. Rep., 385.
Baker *vs.* Village of Norwood, 74 Fed. Rep., 997.

Davidson *vs.* New Orleans, 96 U. S., 97.
Railroad Tax Cases, 115 U. S., 331.

4. The assessment provided for is arbitrary in the extreme. The apportionment of the gross sum is not required to be made according to the benefits conferred, but the amount must be provided for, even if it should equal or exceed the value of the lands against which the same is to be charged, and thus private property taken for the public good without just compensation or any compensation whatever.

Tide Water Co. *vs.* Coster, 3 E. C. Green, 518.
Chamberlain *vs.* Cleveland, 34 Ohio St., 561.
Kean *vs.* Driggs Drainage Co., 45 N. J. L., 94.
State *vs.* Newark, 3 Dutcher, 190.

5. The assessment for supposed benefits is required to be made before the benefits, if any, are conferred. The "benefits" for which the assessments are to be made are such as will result from "the laying out and opening" the highways and reservations (sec. 15, lines 5 to 10). They are to be assessed when the land is condemned, and from the date of the confirmation of the verdict by the court the assessments are to be a lien upon the lands and payable in five equal annual installments, with interest at 4 per cent.; and in default of the payment of any one of the installments the land is to be sold. There is nothing indefinite about this part of the act, and no way is left the unfortunate owner of land to escape payment. But how about the improvements for which he is paying, the laying out and opening of streets and reservations? It may be presumed that they will be made in course of time, but when? They may come after his land is sold to pay the first, second or last installment of the assessment. Some of them will

probably not be made during the present generation. The magnitude of the undertaking is too great for its accomplishment in one year or five or ten, and yet these assessments are to be paid into the treasury. It is a fit instance for the indignant exclamation of the court in Van Horn's Lessee *vs.* Dorrance, from which a quotation has already been made:

"Shame on American legislation that in England, a limited monarchy, where there is no written constitution, where the Parliament is omnipotent and can mould the constitution at pleasure, a more sacred regard should have been paid to property than in America, surrounded, as we are, with a blaze of political illumination, where the legislatures are limited, where we have republican governments and written constitutions, by which the protection and enjoyment of property are rendered inviolable!"

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